Supreme Court, U.S.
FILED

No. 06-561

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IN THE
SUPREME COURT OF THE UNITED STATES

BEVERLY SMITH,

Petitioner,

v.

DEANNA COOK AND ANGELA SMITH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an attorney is a state actor for purposes of an action under 42 U.S.C. § 1983 for violation of the Due Process Clause of the United States Constitution in the fact-specific circumstance where the attorney issues and causes to be served a subpoena of a nonparty's medical records without prior notice and opportunity to be heard in a state which does not provide any remedy to the nonparty for the deprivation of that property interest in privacy when the disclosure is made in response to the subpoena.

Whether, in the context of the narrow facts of this case, by failing to give the requisite notice to a person not a party to the litigation that her medical records were being commanded by subpoena to be produced in a state where there is no deterrence created by a viable cause of action or remedy against the health care provider for producing the records without notice to the patient in response to the subpoena, is the act of issuing the subpoena and causing it to be served upon the health care provider without notice to the patient sufficient to hold the attorney to have wielded the compulsive power of the state to seize the patient's property without pre-deprivation notice or opportunity to be heard in violation of the Due Process Clause of the United States Constitution

PARTIES TO THE PROCEEDINGS

Petitioner is Beverly Smith.

Respondents are Deanna Cook, an attorney in the Commonwealth of Virginia and her client Angela Smith.

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PETITION FOR WRIT OF CERTIORARI

Brenda Smith ("Smith") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Virginia Supreme Court entered in this proceeding on July 26, 2006, in order to resolve the important issue presented herein, that under certain very narrow factual circumstances, a nonparty witness deprived of her property interest in the privacy of her medical records without notice or opportunity to be heard may obtain relief under 42 U.S.C. § 1983 against a private attorney who is a state actor when issuing and causing to be served a subpoena commanding the production of medical records in violation of the Due Process Clause of the United States Constitution when those records are produced and disseminated.

OPINIONS BELOW

The opinion of the Virginia Supreme Court that gives rise to this petition is the order of the Virginia Supreme Court denying Smith's petition for appeal. It is reprinted in Appendix A hereto at page A1. The order of the trial court, the Circuit Court for the City of Richmond in the Commonwealth of Virginia denying Smith a remedy for the deprivation of her privacy of the medical information in her medical records as a nonparty witness in prior litigation is set forth in Appendix C at page A4. The order of the trial court correcting its order of January 19, 2006 is set forth in Appendix B at A3.

JURISDICTION

On July 26, 2006, the Virginia Supreme Court denied Smith's petition for appeal of the January 19, 2006 order of the Circuit Court for the City of Richmond denying Smith's claim of a deprivation of her rights under the Due Process Clause of the United States Constitution. Pursuant to Supreme Court Rule 13(1) this petition has been filed within 90 days of the denial of her petition.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42. U.S.C. § 1983

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Va. Code § 32.1-127.1:03, as amended in 2002

Appendix E

Va Code § 16.1-265. Subpoena; attorney-issued subpoena.

Upon application of a party and pursuant to the rules of the Supreme Court of Virginia for the issuance of subpoenas, the clerk of the court shall issue, and the court

on its own motion may issue, subpoenas requiring attendance and testimony of witnesses and production of records, documents or other tangible objects at any hearing.

Subpoenas duces tecum for medical records shall be subject to the provisions of §§ 8.01-413 and 32.1-127.1:03 except that no separate fee shall be imposed. A subpoena may also be issued in a civil proceeding by an attorney-at-law who is an active member of the Virginia State Bar at the time of issuance, as an officer of the court. Any such subpoena shall be on a form approved by the Committee on District Courts, signed by the attorney as if a pleading and shall include the attorney's address. A copy, together with the attorney's certificate of service pursuant to Rule 1:12, shall be mailed or delivered to the clerk's office of the court in which the case is pending on the day of issuance by the attorney. The law governing subpoenas issued by a clerk shall apply mutatis mutandis, except that attorneys may not issue subpoenas in those cases in which they may not issue a summons as provided in § 8.01-407. When an attorney-at-law transmits one or more subpoenas or subpoenas duces tecum to a sheriff to be served in his jurisdiction, the provisions in § 8.01-407 regarding such transmittals shall apply. A sheriff shall not be required to serve an attorney-issued subpoena that is not issued at least five business days prior to the date production of evidence is required.

If the time for compliance with a subpoena issued by an attorney is less than 14 days after service of the subpoena, the person to whom it is directed may serve upon the party issuing the subpoena a written objection setting

forth any grounds therefor. If objection is made, the party on whose behalf the subpoena was issued and served shall not be entitled to compliance, except pursuant to an order of the court, but may, upon notice to the person to whom the subpoena was directed, move for an order to compel compliance. Upon such timely motion, the court may quash, modify or sustai the subpoena.

STATEMENT OF THE CASE

Beverly Smith ("Smith") filed suit in state court against Angela Cook ("Cook"), her client Angela Smith and others seeking redress pursuant to 42 U.S.C. § 1983 for denial of due process in connection with the deprivation of her privacy interest in the health care information contained in her medical records, and the right to contest the disclosure and dissemination of that information, interests protected by both state statute and by the penumbra of the United States Constitution.

Cook, a private attorney licensed by the Commonwealth of Virginia, on behalf of her client Angela Smith and as an officer of the court, pursuant to Va Code § 16.1-265 issued a subpoena to a health care provider for Smith's medical records in a custody case in which patient Smith was not a party without providing the statutorily required notice under Va. Code § 32.1-127.1:03.

In 2002, Va. Code § 32.1-127.1:03 provided in pertinent part, "No party to an action shall request or cause the issuance of a subpoena duces tecum for the medical records of a nonparty witness unless a copy of the request for the subpoena or a copy of the attorney-issued subpoena is provided to the nonparty witness simultaneously with filing the request or issuance of the attorney-issued subpoena." Additionally, the statute required that with a copy of the subpoena, the nonparty witness was to receive "a statement informing them of their rights and remedies...."

Cook did not send a copy of the subpoena to Smith as required by statute and Smith did not receive the copy of the attorney issued subpoena or the notice and statement of rights and remedies required by law, prior to the deprivation of her medical privacy.

Once served and in response to the subpoena the health care provider produced the records disclosing Smith's personal and confidential content and information in her psychiatric medical records without her authorization, resulting in the loss of her statutory right of privacy to the content and information of her medical/health records and in emotional and physical injuries.

While Virginia in *Fairfax Hospital v. Curtis*, 254 Va. 437,492 S.E.2d 642 (1997) recognized a cause of action against medical care providers for unauthorized disclosure of a patient's health care information, the Virginia Court determined that disclosure of that information in response to a subpoena is not unauthorized irrespective of the failure of the attorney to provide the statutory notice and disclosures and not actionable under state law.

The suit including the due process claim brought under 42 U.S.C. § 1983 was dismissed on January 19, 2006 for failure to state a cause of action on the demurrer to the pleadings filed by the defendant.

A petition for appeal was timely filed to the Virginia Supreme Court. The Virginia Supreme Court denied the petition for appeal on July 26, 2006.

This petition for certiorari is timely filed.

REASONS FOR GRANTING THE WRIT

I. In rare and fact specific circumstances, an attorney should be considered a "state actor" liable for violation of due process when the private attorney, acting on her client's behalf and as an officer of the court, invokes the machinery of the state to effect an ex parte seizure of property without prior notice or an opportunity to be heard.

In most instances involving attorney issued subpoena the party to whom the subpoena is directed and the parties to the litigation receive notice of the issuance of the subpoena and are able to be heard before any deprivation occurs.

Merely because the instances are rare in which an attorney issuing a subpoena invokes the machinery of the state to effectuate an ex parte seizure of property without prior notice or opportunity to be heard does not justify a

blanket rule of law, removed from factual inquiry, that a private attorney issuing a subpoena can never be a state actor. A number of Federal Circuits and states have held otherwise. *See Hahn v. Star Bank*, 190 F.3d 708, 717 (6th Cir. 1999)("a private attorney issuing a subpoena does not become a state actor for the purposes of § 1983") *Barnard v. Young*, 720 F.2d 1188, 1189 (10th Cir. 1983)("Application of the *Lugar* test does not change the vast weight of authority that private attorneys, by virtue of being officers of the court, do not act under color of state law within the meaning of section 1983. *Polk County v. Dodson*, 454 U.S. 312, 318, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981). n2") *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 278 (3d Cir. 1999)("an attorney does not become a state actor simply by employing the state's subpoena laws") See also *Atlas v. Stolberg*, 694 So. 2d 772 (Fla. 4th DCA 1997)("it is well settled that private lawyers are not state actors for purposes of section 1983 liability") *Dyess v. La. State Univ. Bd. of Supervisors*, 2005 U.S. Dist. LEXIS 18314 (D. La. 2005) ("This Court concurs with these decisions and holds that a private attorney's issuance of a subpoena does not make the attorney a state actor for purposes of § 1983" and "the Fifth Circuit has not addressed whether an attorney who issues a subpoena may fairly be said to be a state actor, it has held that "private attorneys . . . are not official state actors, and generally are not subject to suit under section 1983." *Mills v. Criminal Dist. Court # 3*, 837 F.2d 677, 679 (5th Cir. 1988)).

A claim upon which relief may be granted to Smith against Cook under § 1983 must embody at least two elements. Smith is first bound to show that she has been deprived of a right "secured by the Constitution and the laws" of the United States. Smith must secondly show that Cook

deprived her of this right acting "under color of any statute" of the State of Virginia. It is clear that these two elements denote two separate areas of inquiry. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-156 (U.S. 1978) *citing* Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970).

In order to rely on the Due Process Clause, a plaintiff must have a protectible interest. Smith's protectible interest is her constitutional and statutory interest in medical privacy. Virginia law recognizes plaintiff's rights of privacy in Virginia Code § 32.1-127.1:03. Likewise, Smith has a constitutional right to medical privacy. *See eg. Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705 (1973), *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965) (marital privacy in decisions of birth control). Defendant Cook deprived plaintiff of her right to medical privacy under Virginia law and her property interest in medical privacy without notice or an opportunity to be heard in violation of Fourteenth Amendment to the U.S. Constitution.

Because the Fourteenth Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as "state action." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 923-924 (1982). Here, under applicable U. S. Supreme Court precedent, the State's express "deputization" of attorney Cook to issue process, and the service of the process on the health care provider, caused the unlawful release and disclosure of Smith's private health/medical information in the medical records as well as the right to contest the disclosure of that information, property rights granted to her by Virginia statute and protected by the Due Process Clause of the Constitution. The claim against defendant Cook thus concerns the relationship between the §

1983 requirement of action under color of state law and the Fourteenth Amendment requirement of state action. *Id.*

The question of whether an individual acted "under color of state law" and, therefore, whether the individual is liable for the federal or constitutional injury under 42 U.S.C. § 1983, is inherently a mixed question of law and *fact* and has been recognized by the U. S. Supreme Court **as fact specific**. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 938-939 (1982). It necessarily requires a sifting of the facts and circumstances involving any alleged public-private action. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

The "State Action" In this Case

The actions which caused the injury in this case involve State-authorized and served legal process commanding the production of the medical records of Smith without prior notice to Smith or opportunity to be heard and without any deterrence to health care providers from complying with the subpoena's command.

The force and compulsion of state power is behind an attorney-issued subpoena. A subpoena is the order of an arm of the state compelling the presence of a person under threat of contempt. That the state traditionally grants litigants and their attorneys the privilege of invoking the subpoena power does not alter the fact that it is the state, not the litigant or his attorney, which is compelling the attendance. The state could not effectively provide a forum for the litigation of legal disputes without power to compel the attendance of witnesses. The fact that a subpoena issues in the name of the

state and the fact that a subpoena implements the general state interest of providing a forum for litigation amply demonstrate that the issuance of a subpoena is not merely a private act. The litigant or attorney who invokes the subpoena power acts for the state when commanding production of documents. Because she is engaged in litigation in a state forum, she has been entrusted by the state with significant state power. The significance of a private party acting for and in the name of the State is not a new concept. Virginia has provided the United States Supreme Court with a number of opportunities that explain the reach of the Constitution in restraining violations made under color of state law which include *Ex parte Va.,* 100 U.S. 339, 347 (U.S. 1880). In that case, this Court addressed the restraint of the Fourteenth Amendment against "one who acts in the name and for the State and is clothed with the State's power."

The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

But the Constitutional Amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was

given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured. *Ex parte Va.*, 100 U.S. 339, 347 (1880). There can be no doubt at least since *Ex parte Virginia*, 100 U.S. 339, 346-347, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. *See Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 287-296, 33 S. Ct. 312 (1913); *Monroe v. Pape*, 365 U.S. 167, 171-172, 81 S. Ct. 473, 497 (1961) partially overruled by *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 695-701, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978) (municipalities are not immune from § 1983 actions)

Congress, in enacting § 1983 meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. *Cf. Williams v. United States*, 341 U.S. 97, 71 S. Ct. 576 (1951); *Screws v. United States*, 325 U.S. 91, 65 S. Ct. 1031 (1945); *United States v. Classic*, 313 U.S. 299, 61 S. Ct. 1031 (1941). *Monroe v. Pape*, 365 U.S. at 172, 81 U.S. at 497.

In the present case, Cook caused an attorney-issued subpoena to be served upon Dr. Kryzanowski for the production of a non-party's private health care records without providing the statutorily mandated notice under Virginia Code § 32.1-127.1:03 to the non-party, Smith. The content of those records was thereafter indiscriminately disclosed to the attorneys and litigants in a state domestic

proceeding and Smith was harmed suffering humiliation, emotional and physical injuries. Smith was damaged by the loss of her right to have a judicial officer determine whether there was a basis for disseminating her confidential patient information and communications with her doctor to third persons before the dissemination. Smith was required to obtain medical treatment and incurred medical bills associated with the disclosure. AMFJ § 66 – 73

The Applicable Tests

As previously indicated, the question of whether an individual acted "under color of state law" and, therefore, whether she is a "state actor" is fact specific. The focus is not whether the person is a state employee.[1] Although in

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[1] See, e.g., *Polk County v. Dodson*, 454 U.S. 312, 318, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981), where the Supreme Court held that a public defender's actions, when performing a lawyer's traditional functions as counsel in a state criminal proceeding, would *not* support a § 1983 suit. However, the Court specifically stated that it was not necessary in that case to consider whether that requirement was identical to the "state action" requirement of the Fourteenth Amendment because the public defender, although a state employee, in the day-to-day defense of his client, acted ***in a role adversarial to the State***. Accordingly, on the facts of that case, it was "peculiarly difficult" to detect any action of the State. 454 U.S., at 320. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (U.S. 1982). In the present case, however, attorney Cook was *not* in an adversarial role to the State, but was acting as an arm of the state using the expressly granted power and agency of the State to command by legal process

most instances being employed by the state will suffice due to the duties of the employee, but as will be explained below, the reverse is also true, one need not be an employee of the state to act under color of state law. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 938-939 (1982), the "complaint alleged that in attaching his property respondents had acted jointly with the State to deprive him of his property without due process of law." To sustain the claim, the Supreme Court required that conduct alleging deprivation of a Federal right must be "fairly attributable" to the State. Two elements establish "fair attribution," elements which are present in the case at bar: (1) the deprivation must be caused, in part, by either the exercise of some right or privilege created by the State or by a person for whom the State is responsible, and (2) the party charged with the deprivation must be said to be a state actor. The latter is satisfied not only if he is a state official, but also *if he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Id.* at 937. In interpreting this standard, courts have made clear that "both parts of the *Lugar* test *are satisfied* where the nature of the relationship between the state and private actor is one of interdependence or `symbiosis,'" i.e. an "arrangement that confers on each a variety of mutual benefits." *Jackson v. Pantazes*, 810 F.2d 426,430 (4th Cir. 1987), *citing Burton v. Wilmington Parking Authority*; *see also Dennis v. Sparks*, 449 U.S. 24, 27-29 (1980); *Pfannsteil v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir. 1990); *Crowe v. Lucas*, 595 F.2d 985 (5th Cir.

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the release of Smith's private medical information, albeit without affording Smith the due process to which she was entitled.

1979).[2] In keeping with the fact specific nature of "state action," the *Lugar* Court noted a variety of tests under which state-action may be established:

> [T]he Court has articulated a number of different factors or tests in different contexts: e. g., ***the "public function" test***, *see Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); ***the "state compulsion" test***, *see Adickes v. S. H. Kress & Co.*, 398 U.S., at 170; ***the "nexus" test***, *see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); and, in the case of prejudgment attachments, ***a "joint action test***," *Flagg Brothers*, 436 U.S., at 157. n21 Whether these different tests are actually different in operation or simply different

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[2] Numerous other Supreme Court cases have recognized that private action is fairly attributable to the state. *See Terry v. Adams*, 345 U.S. 461 (1953) (Political activities of the private, racist Jaybird Association deprives citizens of voting rights because of their color); *Burton v. Wilmington Parking Authority*, 365 U.S. at 725 ("By its inaction, the Authority, and through it the state, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination"); *Lombard v. Louisiana*, 373 U.S. 267 (1963) (Action by private lunch counter owner constituted state action despite absence of state ordinance requiring discriminatory conduct); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) (Actions by private homeowners association under restrictive covenants enforcible by state process constituted state action).

> ways of characterizing the ***necessarily fact-bound inquiry*** that confronts the Court in such a situation need not be resolved here. See *Burton*, supra, at 722 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance").

Lugar v. Edmondson Oil Co., 457 U.S. at 938-939 (1982)(emphasis added).

Using the public function test, the Supreme Court has found state action present "in the exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). In the present case, the subpoena power is a power traditionally exclusively reserved to the state. By statute that power is exercised by an officer of the court, the attorney Cook. The public function test is satisfied. The joint action test for state action is met where private persons are "willful participant[s] in joint activity with the State or its agents" that effects a constitutional deprivation. *Howerton v. Gabica*, 708 F.2d 380, 383 (CA9 1983).

Attorney Cook, although a private attorney and acting on behalf of her client, a private party, willfully participate in the joint activity with the State and specifically the judiciary by compelling production of documents by means of a subpoena duces tecum. The joint action test is satisfied. Finally, under the nexus test, the court must consider whether there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."

Jackson, 419 U.S. at 351. Here it is important to note that the power to issue the subpoena duces tecum is not given to the public at large, but is given to attorneys, a profession regulated by the State and ultimately the court. The subpoena on its face reeks of the authority of the State. "To the person summoned: You are commanded to make available the documents and tangible things designated and described below...." It is hard to imagine a closer nexus to the state, then the wielding of the judiciaries power to command the production of the documents. The nexus test is satisfied.

Instigating state court litigation does not make an attorney a state actor, due to the fact that as this court and all attorneys know, instigating litigation does nothing to take property from a person. Most of the actions conducted by attorneys in representing private parties before the courts of the Commonwealth of Virginia may not be attributed to the state and are therefore not state action. However, on the specific facts of this case, the question is whether the attorney, armed with the subpoena power has been clothed to act in the name and for the State, by virtue of the statutory authority and power expressly granted to the attorney as an officer of the court to issue a subpoena for documents **commanding** under threat of legal sanction the production of those documents without affording to a non-party the notice that their property interests are about to be taken and without any deterrence or liability of the physician to determine whether the patient was given notice of the subpoena.

There is no question but that Beverly Smith's property interest in the privacy of her health records was taken from her without notice or opportunity to be heard. In

this regard, she was "deprived . . . of life, liberty, or property, without due process of law" by persons who were "the agents of the State in the denial of the rights which were intended to be secured." *Ex Parte Virginia, supra,* 100 U.S. at 347. In issuing the subpoena, Cook, was not merely engaging in private practice of law on behalf of her private client—she was also acting as the agent of the State, ordering the production of the documents and with it the property of Beverly Smith, the confidential health information. The actions of issuing and causing to be served the process, these action are chargeable as "State actions" and Cook is liable for the violations of law and injury that arise from her authorized but improper actions.

In *Lugar v. Edmonson Oil Co.*, it was the joint action of the creditor with the clerk and the Sheriff that caused the taking, satisfying the "**joint action test**." *See, Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 939, 102 S. Ct. at 2755 n.21. In *Lugar*, it was the pre-judgment taking, accomplished with the assistance of the sheriff, that created an actionable constitutional violation. In that case, a lessee-operator of a truckstop in Virginia was indebted to his supplier, an oil company. *Lugar,* 457 U.S. at 924. The supplier sued on the debt and sought prejudgment attachment of the lessee's property. *Id.* Under Virginia law, the prejudgment attachment procedure required only that the creditor allege in an ex parte petition a belief that the debtor was disposing of or might dispose of his property in order to defeat his creditors. *Id.* Acting upon the petition of the supplier, the clerk of the state court issued a writ of attachment, which was then executed by the county sheriff, thereby sequestering lessee's property. *Id.* The Supreme Court held that where a state has created a procedure whereby state officials, acting on the ex parte

petition of a private party, may attach disputed property, state action exists. *Id.* at 941-42.

> "'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,'"

Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (U.S., 1982), *quoting United States v. Price*, 383 U.S., at 794. The U.S. Supreme Court has "consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (U.S., 1982).

In the present case, the taking of Smith's privacy was accomplished by virtue of Cook's joint role both as private advocate and also as an officer of the Court authorized by statute to issue the subpoena for the documents, satisfying the both the "**joint action test**" and the "**public function test**." *Lugar* at 938-39 *citing Terry v. Adams*, 345 U.S. 461 (1953), a case involving a political parties exclusion of persons based upon race and *Marsh v. Alabama*, 326 U.S. 501 (1946), a case involving a corporation owned town's prohibition on distribution of literature. In both cases, the traditional role of government in voting or management of a town caused the Court to consider the public function rather than the fact that the political party and corporation were private.

Similarly, Cook, by issuing the subpoena, fulfilled the role of the court which traditionally issued orders for the production of documents. Under the facts of this case, where Beverly Smith was denied the statutory notice and opportunity to be heard, it is even more important to cause the legislation to act upon persons and not the abstract thing denominated a State, but upon persons who are the agents of the State in the denial of the rights which were intended to be secured. *Ex parte Va.*, 100 U.S. 339, 347 (U.S. 1880).

Additionally, holding Cook to be acting under of color of state law under the circumstances of this case is required by ***the "nexus" test.*** *Lugar*, at 938-39 *citing Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). In this case, the authority to issue subpoenas by attorneys is given, and therefore the proscriptions of the Fourteenth Amendment must be complied with by the attorney as certainly as though the proscription was written into the statute authorizing the attorney to issue the subpoena, as in fact it is. In *Burton*, a case involving a private restaurant leasing space from a public facility, the Court stated, "what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (U.S. 1961). The Court reiterated the detailed inquiry necessary in deciding these cases, stating "But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the

regulated entity so that the action of the latter may be fairly treated as that of the State itself. *Moose Lodge No. 107*, supra, at 176. The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met. *Burton v. Wilmington Parking Authority, supra." Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (U.S. 1974) (finding no state action in a regulated enterprise).

The Third Circuit in *Angelico* recognized the necessity of a fact specific inquiry hedging its ruling with the term "simply" and cited approvingly from *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1264 (3d Cir. 1994), that

> a private individual who enlists the compulsive powers of the state to seize property by executing on a judgment without pre-deprivation notice or hearing acts under color of law and so may be held liable under section 1983 if his acts cause a state official to use the state's power of legal compulsion to deprive another of property.

Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 278 (3d Cir. 1999) *citing Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d at 1267.

Private attorneys, acting on their client's behalf, who invoke the machinery of the state to effect an ex parte seizure of property without notice or opportunity to be heard should be found to be state actors under § 1983.

The specific legal and factual inquiry must focus on the compulsive power of the state to seize property without pre-deprivation notice or an opportunity to be heard. In the context of the narrow facts of this case, the inquiry is whether by failing to give the requisite notice to a person not a party to the litigation that her medical records were being commanded by subpoena to be produced where there is no deterrence created by a viable cause of action or remedy against the health care provider for producing the records without notice to the patient in response to the subpoena, is the act of issuing the subpoena and causing it to be served upon the health care provider without notice to the patient sufficient to hold the attorney to have wielded the compulsive power of the state to seize the patient's property without pre-deprivation notice or opportunity to be heard in violation of the Due Process Clause of the United States Constitution.

In *Angelico*, the Third Circuit focused on the distinction between the potential for state involvement and actual state involvement. *Angelico v. Lehigh Valley Hosp., Inc.,* 184 F.3d 268, 278 (3d Cir. 1999). The court approved of the lower court's analysis which in pertinent part provided:

> Although plaintiff notes that there are potential legal consequences attached to failure to obey a subpoena which might ultimately involve invoking the assistance of state officials, such possibility serves only to highlight the difference between resorting to an available state procedure and actually using state officials to enforce or carry out that procedure. The potential for involving the coercive power of the state likewise exists when a judgment by confession is entered, yet . . . a private party is not converted into a

> state actor as long as the assistance of state officials remains merely a potential threat. It is only when, and if, such potential is realized that a private party may be converted into a state actor for purposes of satisfying the state action element of a § 1983 claim. Angelico I, 1996 WL 524112, at 2.

The Third Circuit found the analysis sound and consistent with the Supreme Court's analysis in *Lugar*, concluding "We hold, therefore, that an attorney does not become a state actor simply by employing the state's subpoena laws." *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 278 (3d Cir. 1999).

In *Angelico*, the defendants were lawyers who were retained to obtain and execute a confessed judgment in a rent dispute.

In the present case, where the state does not provide any deterrence to health care providers from producing the health care records in response to the subpoena by denying any cause of action against them coupled with the attorney's failure to provide any pre-deprivation notice to the patient, the command of the state authorized subpoena is itself the compulsive power of the state, the machinery of the state to effect an ex parte seizure of property upon which the private attorney can be found to be a state actor under § 1983 and liable for failing to provide notice and opportunity to be heard.

The Amended Motion for Judgment Properly Alleged The Necessary State Action to Sustain an Actionable §1983 Claim

Under the facts alleged in the Amended Motion for Judgment, defendant Cook, acting under color of state law, deprived Beverly Smith not only of the confidential mental health information, but also her right to notice of the subpoena to enable her to move to quash. Cook acted under color of state law. A9-A13 (¶¶ 7, 8, 9, 10, 11, 16, 19.) Smith had a property right to the content of her medical record and the privacy of that content. Va. Code § 32.1-127.1:03. A14 (¶ 23 & 25). As an officer of the Court, and pursuant to state statute, Cook acting for Angela Smith caused the loss of that property right without notice or an opportunity to be heard in violation of due process under the Fourteenth Amendment to the United States Constitution. A14-A16 (¶¶ 22 – 37). Beverly Smith was damaged as a proximate result. A15-A18 (¶ 36 & 37).

Upon *de novo* review, defendant Cook's assertion on demurrer that Smith failed to state a cause of action under 42 U.S.C. § 1983 should therefore be overruled and denied and the case remanded to Virginia for trial consistent with this Court's ruling.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE VIRGINIA SUPREME COURT DATED AND FILED JULY 26, 2006

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 26th day of July 2006.

Beverly Smith, Appellant,

against Record No. 060761
Circuit Court No. 760CL04S01780-00/06-697

Leslie J. Kryzanowski, et al., Appellees.

From the Circuit Court of the City of Richmond

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

APPENDIX B

OPINION OF THE CIRCUIT COURT FOR THE CITY OF RICHMOND, COMMONWEALTH OF VIRGINIA DATED AND FILED JUNE 19, 2006

VIRGINIA:
IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

BEVERLY SMITH,
Plaintiff
v. CASE NO. 760CL04201780-00

LESLIE J. KRYZANOWSKI, et al.
Defendants.

ORDER CORRECTING CLERICAL MISTAKES AND ERRORS ARISING FROM OVERSIGHT

Upon the motion to correct the order of 1/19/06, and in keeping with the Court's opinion as set forth in its letter of January 11, 2006 and incorporated in said order, it is ADJUDGED ORDERED and DECREED that the last paragraph of page 2 of the order dated 1/19/2006 is corrected to read

"IT FURTHER APPEARING that Plaintiff's Motion for Judgment and First Amended Motion for Judgment were filed by Plaintiff and her counsel, Thomas H. Roberts, Esquire and are NOT in violation of Virginia Code Ann §

8.01-271.1 and that the Plaintiff's claim under 42 U.S.C. § 1983 was NOT unreasonable, frivolous, meritless and vexatious so as to award costs and attorneys fees under 42 U.S.C. § 1988, it is hereby"

The endorsements of counsel are dispensed with in the discretion of the court pursuant to Rule 1:13.

APPENDIX C

OPINION OF THE CIRCUIT COURT FOR THE CITY OF RICHMOND, COMMONWEALTH OF VIRGINIA DATED AND FILED JANUARY 19, 2006

V I RG I N I A:
IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

BEVERLY SMITH
Plaintiff,
v. Case No. 760CL04S01780-00/06-697
LESLIE J. KRYZANOWSKI, et al.,
Defendants.

ORDER

THIS MATTER CAME TO BE HEARD upon the Motions to Reconsider this Court's overruling of the Demurrers of Defendants Deanna Cook ("Cook") and Angela Smith to Count II (Negligence) of the First Amended Motion for Judgment ("AMJ") filed by Plaintiff Beverly Smith, and upon the alternative Motions for Summary Judgment file by Cook and Angela Smith seeking the dismissal of the same Count II, and upon Plaintiffs response thereto, and

THIS MATTER CAME TO BE HEARD upon the Demurrer to Count III (Medical Malpractice) filed by

Defendant Leslie J. Kryzanowski, M.D. ("Dr. Kryzanowski"), and upon Plaintiffs response thereto, and

THIS MATTER CAME TO BE HEARD upon the Motions for Sanctions filed by Defendants Deanna Cook and Angela Smith, and

IT APPEARING that by previous letter opinion dated June 2, 2005, and by subsequent Order dated June 27, 2005, both of which are incorporated herein by reference, this Court sustained the demurrers of the Defendants as to all counts of Plaintiff's Motion for Judgment, with leave to amend, and

IT FURTHER APPEARING that Plaintiff thereupon filed her AMJ, to which the Defendants filed their demurrers and other responsive pleadings, and

IT FURTHER APPEARING that following oral argument on the Defendants' demurrers, this court issued its letter opinion dated October 17, 2005, which is incorporated herein by reference, sustaining the demurrers of the Defendants as to Count I of Plaintiffs AMJ without leave to amend, sustaining the demurrer of Dr. Kryzanowski as to Count II of Plaintiffs AMJ without leave to amend, overruling the demurrer of Cook and Angela Smith as to Count II, and overruling the demurrer of Dr. Kryzanowski as to Count III, and

IT FURTHER APPEARING that the Defendants thereupon filed their further dispositive pleadings referenced in the first two paragraphs above, and oral argument was held on November 15, 2005, and

IT FURTHER APPEARING that Plaintiff thereupon filed her motion for leave to file a Second Amended Motion for Judgment, and

IT FURTHER APPEARING for the reasons stated in this Court's letter opinion dated November 22, 2005, which is incorporated herein by reference, that the Demurrers of Cook and Angela Smith as to Count II of Plaintiff's AMJ should be sustained, without further leave to amend, and

IT FURTHER APPEARING for the reasons stated in this Court's letter opinion dated November 22,2005, that Dr. Kryzanowski's Demurrer to Count III of Plaintiffs AMJ should be sustained, without further leave to amend, and IT FURTHER APPEARING that Plaintiffs Motion for Judgment and First Amended Motion for Judgment were filed by Plaintiff and her counsel, Thomas H. Roberts, Esquire in violation of Virginia Code Ann. § 8.01-271.1, that such pleadings were not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and were interposed for an improper purpose to harass or to use unnecessary delay and needless increase in the cost of litigation, and that the conduct of Plaintiff and Plaintiff's counsel in the prosecution of this case was otherwise sanctionable under Code Section 8.01-271.1, and that the filing of Plaintiff's claim under 42 U.S.C. § 1983 was unreasonable, frivolous, meritless and vexation, so as to warrant an award of costs and attorneys' fees to Cook and Angela Smith pursuant to 42 D.S.C. § 1988, it is hereby

ORDERED that the Demurrers of Defendants Deanna Cook and Angela Smith to Count II of Plaintiff's AMJ are

sustained, and Count II is dismissed as to such Defendants with prejudice and without leave to amend, and it is hereby

ORDERED that the Demurrer of Defendant Dr. Kryzanowski to Count III of Plaintiff's AMJ is sustained and Count III is dismissed as to such Defendant with prejudice and without leave to amend, and it is herby

ORDERED that Plaintiff's motion for leave to file her Second Amend Motion for Judgment is denied, and it is hereby

ORDRED that insofar as no Counts remain pending as to any Defendant, this cause is hereby dismissed with prejudice as to all Defendants, and it is herby

ORDERED that for the reasons stated in the court's letter dated January 11, 2006, defendants Deanna Cook and Angela Smith's Motion for Sanctions is Denied.

Plaintiff's exceptions are noted.

The endorsements of counsel are waived pursuant to Rule 1:13.

And nothing further remaining to be done herein, it is ORDERED that his matter is stricken from the docket and placed among the ended causes of this court.

It is so ORDERED.

APPENDIX D

AMENDED MOTION FOR JUDGMENT IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND, COMMONWEALTH OF VIRGINIA DATED AND FILED JUNE 27, 2005.

VIRGINIA:
IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

BEVERLY SMITH,
Plaintiff,
vs. Case No. 760CL04S01780-00
LESLIE J. KRYZANOWSKI,
and
ANGELA SMITH,
and
DEANNA COOK,
Defendants.

FIRST AMENDED
Motion for Judgment

Comes now the plaintiff, by counsel, and for her first amended motion for judgment, moves for judgment jointly and severally against defendants LESLIE J. KRYZANOWSKI, ANGELA SMITH, and DEANNA COOK on the grounds and in the amount shown below:
1. Plaintiff Beverly Smith is a citizen of Virginia and the United States and is a resident of Goochland, Virginia.

2. Defendant Leslie Kryzanowski is a medical doctor specialized in psychiatry who provided medical and mental health treatment to Beverly Smith.
3. Defendant Angela Smith is a resident of Virginia who was a party litigant in a certain proceeding involving, inter alia, custody and visitation of a juvenile in the Juvenile and Domestic Relations District Court for Goochland County, Virginia.
4. Defendant Deanna Cook is a resident of Virginia and is an attorney licensed in the Commonwealth of Virginia and was at all times relevant herein acting as an agent and attorney for Angela Smith in addition to other capacities as set forth below.
5. Plaintiff Beverly Smith is the paternal grandmother of Stone Wyatt Smith, the juvenile who was the subject of a custody and visitation dispute by and between Angela Dawn Smith and Dean E. Smith in the Juvenile and Domestic Relations District Court for Goochland County, Virginia.
6. Plaintiff Beverly Smith was not a party or "party witness" to the litigation in the Juvenile and Domestic Relations District Court for Goochland County, Virginia.
7. In 2000, Virginia Code § 16.1-265 provided in pertinent part as follows:

Upon application of a party and pursuant to the rules of the Supreme Court of Virginia for the issuance of subpoenas, the clerk of the court shall issue, and the court on its own motion may issue, subpoenas requiring attendance and testimony of witnesses and production of records, documents or other tangible objects at any hearing. Subpoenas duces tecum for medical records shall be subject to the provisions of §§§§ 8.01-413 and 32.1-277.1:03 except that no separate fee shall be imposed. A subpoena may also be issued in a civil proceeding by an attorney-at-law who is an active member of

the Virginia State Bar at the time of issuance, as an officer of the court. Any such subpoena shall be on a form approved by the Committee on District Courts, signed by the attorney as if a pleading and shall include the attorney''s address. A copy, together with the attorney''s certificate of service pursuant to Rule 1:12, shall be mailed or delivered to the clerk''s office of the court in which the case is pending on the day of issuance by the attorney. The law governing subpoenas issued by a clerk shall apply mutatis mutandis, except that attorneys may not issue subpoenas in those cases in which they may not issue a summons as provided in §§ 8.01-407 and may not issue a subpoena duces tecum less than five business days prior to the date that production of evidence is required. When an attorney-at-law transmits one or more subpoenas or subpoenas duces tecum to a sheriff to be served in his jurisdiction, the provisions in §§ 8.01-407 regarding such transmittals shall apply. If the time for compliance with a subpoena issued by an attorney is less than fourteen days after service of the subpoena, the person to whom it is directed may serve upon the party issuing the subpoena a written objection setting forth any grounds therefor. If objection is made, the party on whose behalf the subpoena was issued and served shall not be entitled to compliance, except pursuant to an order of the court, but may, upon notice to the person to whom the subpoena was directed, move for an order to compel compliance. Upon such timely motion, the court may quash, modify or sustain the subpoena. (Emphasis added)

8. In or around August, 2002, under color of state law, pursuant to a procedural scheme created by statute, citing as authority for her actions, §§ 8.01-413, 16.1-89 and 16.1-265, Deanna Cook, an attorney in the Commonwealth of Virginia, acting for and on behalf of Angela Smith, a party to the

custody and visitation proceedings, by her attorney, issued an attorney issued subpoena duces tecum (See the attached Exhibit 1 incorporated herein by this reference with Exhibit "A" describing the medical/psychiatric records of Beverly Smith to be produced), commanding the production of Beverly Smith's medical/psychiatric records from Leslie J. Krzanowski without affording to Beverly Smith any notice that her records were being subpoenaed and all in violation of § 8.01-399(D) and § 32.1-127.1:03.

9. The subpoena was issued under color of state law by an officer of the court but was not a "court authorized subpoena."

10. In 2002, Virginia Code § 32.1-127.1:03(H)(1) provided in pertinent part, "No party to an action shall request or cause the issuance of a subpoena duces tecum for the medical records of a nonparty witness unless a copy of the request for the subpoena or a copy of the attorney-issued subpoena is provided to the nonparty witness simultaneously with filing the request or issuance of the attorney-issued subpoena."

11. Additionally, in 2002, Virginia Code § 32.1-127.1:03 provided in part that "In instances where medical records being subpoenaed are those of a ...nonparty witness, the party requesting or issuing the subpoena shall deliver to the ...nonparty witness together with the copy of the request for subpoena, or a copy of the subpoena in the case of an attorney-issued subpoena, a statement informing them of their rights and remedies...."

12. Additionally, in 2002, Virginia Code § 32.1-127.1:03 provided in part that the statement referenced above should be provided to the nonparty witness as follows:

NOTICE TO PATIENT

The attached document means that (insert name of party requesting or causing issuance of the subpoena) has either

asked the court to issue a subpoena or a subpoena has been issued by the other party's attorney to your doctor or other health care providers (names of health care providers inserted here) requiring them to produce your medical records. Your doctor or other health care provider is required to respond by providing a copy of your medical records. If you believe your records should not be disclosed and object to their disclosure, you have the right to file a motion with the clerk of the court to quash the subpoena. You may contact the clerk's office to determine the requirements that must be satisfied when filing a motion to quash and you may elect to contact an attorney to represent your interest. If you elect to file a motion to quash, it must be filed as soon as possible before the provider sends out the records in response to the subpoena. If you elect to file a motion to quash, you must notify your doctor or other health care provider(s) that you are filing the motion so that the provider knows to send the records to the clerk of court in a sealed envelope or package for safekeeping while your motion is decided.

13. Plaintiff Beverly Smith did not receive the foregoing notice or statement of rights and remedies.

14. The Virginia Code § 32.1-127.1:03(D) provides for disclosure of medical records under circumstances not present in this case. The code provides in pertinent part as follows: D. Health care entities may disclose health records:

> 13. To the attorney and/or guardian ad litem of a minor who represents such minor in any judicial or administrative proceeding, if the court or administrative hearing officer has entered an order granting the attorney or guardian ad litem this right and such attorney or guardian ad litem presents evidence to the health care entity of such order;

15. Leslie J. Krzanowski produced to Angela Smith and Deanna Cook and to the court the medical/psychiatric records of Beverly Smith without Beverly Smith's authorization or consent and without notice to Beverly Smith.
16. In turn, Angela Smith by her attorney Deanna Cook disseminated the medical/psychiatric information of Beverly Smith without Beverly Smith's authorization or consent and without notice to Beverly Smith.
17. Leslie J. Krzanowski and Angela Smith jointly engaged and participated with Deanna Cook, acting as an officer of the court, in depriving Beverly Smith of the confidential medical information contained in the medical records.

Count 1
42 U.S.C. § 1983

18. Paragraphs 1 - 17 are incorporated herein.
19. Plaintiff need not allege that the defendants were acting on behalf of the state, but instead that the defendants "under color of any statute, ordinance, regulation, custom or usage of" Virginia "subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" which is what plaintiff alleges by this and other paragraphs herein.
20. 42 U.S.C. § 1983 provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in

an action at law, suit in equity, or other proper proceeding for redress....

21. Plaintiff was deprived of (1) her medical privacy secured by the Constitution and laws and (2) her property right to the confidentiality of her medical records under Virginia law without due process.

22. The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." 14th Amendment to the U.S. Constitution.

23. Beverly Smith has a constitutional right to medical privacy. See eg. Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973), Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965) (marital privacy in decisions of birth control).

24. Beverly Smith had a constitutional right to due process before her property was taken from her.

25. While the written, printed or electronically recorded material maintained by Dr. Leslie J. Krzanowski are by Virginia statute, the property of Dr. Krzanowski under Va. Code § 32.1-127.1:03, the plaintiff had a statutory right of privacy to the content and information of her medical/health records. Id. ("There is hereby recognized a patient's right of privacy in the content of a patient's medical record."(Va. Code § 32.1-127.1:03 as it read in 2002).

26. Beverly Smith challenges the constitutionality of Va. Code § 32.1-127.1:03 to the extent that it may be interpreted to provide any right of ownership to Dr. Krzanowski independent of Beverly Smith to the content and information in contrast to the written, printed or electronically recorded material maintained by Dr. Leslie J. Krzanowski.

27. Cook as an officer of the court acting under color of state law pursuant to a procedural scheme created by state statute deprived plaintiff of her property interest namely her medical

privacy without notice or an opportunity to be heard in violation of 14th Amendment to the U.S. Constitution.
28. Beverly Smith's deprivation of her medical privacy resulted from the exercise of a right or privilege having its source in state authority.
29. Beverly Smith was deprived of her right to notice and to an opportunity to be heard.
30. Defendants are appropriately characterized as "state actors."
31. Leslie J. Krzanowski and Angela Smith jointly and willfully engaged and participated with Deanna Cook, who was acting as an officer of the court when she issued the subpoena for medical records which contained the confidential medical information belonging to Beverly Smith depriving her of her property interest in the confidentiality of her medical information contained in the medical records, and thereby acted "under color" of law for purposes of 42 U.S.C. §1983.
32. Defendants acted pursuant to a procedural scheme created by statute which is the product of state action.
33. This is not the case of a mere private misuse of a state statute.
34. Leslie J. Krzanowski, Angela Smith, Deanna Cook, all acted under color of law, albeit as a result of the abuse of the authority by Deanna Cook, to obtain the disclosure of the medical/psychiatric information of Beverly Smith without her consent, authorization and without notice.
35. The privacy of the medical/psychiatric information of Beverly Smith constituted the private property of Beverly Smith.
36. The private property of Beverly Smith was taken without due process of law, without notice and without compensation.

37. As a result of the Constitutional violations, Beverly Smith has suffered the loss of her privacy, and further suffered emotional distress, including but not limited to physical injuries including loss of appetite, sleeplessness, nausea together with depression and other severe emotional injuries, and past and future medical bills.

Count 2
Negligence

38. Paragraphs 1 - 17 are incorporated herein.
39. Leslie J. Krzanowski, Angela Smith and Deanna Cook, each owed Beverly Smith a duty not to breach the privacy interest that Beverly Smith had to her medical/psychiatric records.
40. The foregoing duty was not voided by any abuse of authority by an attorney issuing a subpoena pursuant to §§ 8.01-413, 16.1-89 or 16.1-265 of the Code of Virginia where no notice was provided to Beverly Smith as required by § 32.1-127.1:03.
41. It is well established in Virginia that a health care provider owes a duty of reasonable care to its patient, including but not limited to a duty and obligation by the health care provider to preserve the confidentiality of information about the patient which was communicated to the health care provider or discovered by the health care provider during the course of treatment. Fairfax Hospital v. Curtis, 254, Va. 437, 442, 492 S.E.2d 642 (1997).
42. The foregoing duty was not voided by any abuse of authority by an attorney issuing a subpoena pursuant to §§ 8.01-413, 16.1-89 or 16.1-265 of the Code of Virginia where no notice was provided to Beverly Smith as required by § 32.1-127.1:03.

43. It is well established in Virginia that confidentiality is an integral aspect of the relationship between a health care provider and a patient. Fairfax Hospital v. Curtis, 254, Va. 437, 442, 492 S.E.2d 642 (1997).

44. The foregoing duty was not voided by any abuse of authority by an attorney issuing a subpoena pursuant to §§ 8.01-413, 16.1-89 or 16.1-265 of the Code of Virginia where no notice was provided to Beverly Smith as required by § 32.1-127.1:03.

45. It is well established in Virginia that in the absence of a statutory to the contrary, or absent a serious danger to the patient or others, a health care provider owes a duty to the patient not to disclose information gained from the patient during the course of treatment without the patient's authorization, and that violation of this duty gives rise to an action in tort. Fairfax Hospital v. Curtis, 254, Va. 437, 442, 492 S.E.2d 642 (1997).

46. The foregoing duty was not voided by any abuse of authority by an attorney issuing a subpoena pursuant to §§ 8.01-413, 16.1-89 or 16.1-265 of the Code of Virginia where no notice was provided to Beverly Smith as required by § 32.1-127.1:03.

47. In the absence of a statutory command to the contrary, or absent a serious danger to the patient or others, a health care provider owes a duty to the patient not to disclose information gained from the patient during the course of treatment without the patient's authorization, and that violation of this duty gives rise to an action in tort. Fairfax Hosp. by & Through INOVA Health Sys. Hosps. v. Curtis, 254 Va. 437, 442 (Va., 1997).

48. In the present case there was neither a statutory command to the contrary, nor a serious danger to the patient or others that relieved Dr. Kryzanowski of her duty.

49. The foregoing duty was not voided by any abuse of authority by an attorney issuing a subpoena pursuant to §§ 8.01-413, 16.1-89 or 16.1-265 of the Code of Virginia where no notice was provided to Beverly Smith as required by § 32.1-127.1:03.

50. It was well established that Virginia Code § 32.1-127.1:03, entitled "Patient health records privacy" provides in pertinent part that " There is hereby recognized a patient's right of privacy in the content of a patient's medical record. Patient records are the property of the provider maintaining them, and, except when permitted by this section or by another provision of state or federal law, no provider, or other person working in a health care setting, may disclose the records of a patient."

51. The foregoing duty was not voided by any abuse of authority by an attorney issuing a subpoena pursuant to §§ 8.01-413, 16.1-89 or 16.1-265 of the Code of Virginia where no notice was provided to Beverly Smith as required by § 32.1-127.1:03.

52. Numerous other courts have recognized a right of privacy in a patients records. See Whalen v. Roe, 429 U.S. 589, 598-99, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3rd Cir. 1980); Shoemaker v. Handel, 608 F. Supp. 1151, 1159 (D.N.J. 1985).

53. Nevertheless, defendants Leslie J. Krzanowski, Angela Smith, and Deanna Cook caused the confidential information of the plaintiff to be disclosed without plaintiff's consent and without following the procedures outlined in Va. Code § 32.1-127.1:03.

54. Deanna Cook issued and caused to be served the attorney issued subpoena for documents seeking the production of medical records of plaintiff without providing

to plaintiff a copy of the request in contravention of the duties imposed by Va. Code that provided in pertinent part that "No party to an action shall request or cause the issuance of a subpoena duces tecum for the medical records of a nonparty witness unless a copy of the request for the subpoena or a copy of the attorney-issued subpoena is provided to the nonparty witness simultaneously with filing the request or issuance of the attorney-issued subpoena."

55. Deanna Cook issued and caused to be served the attorney issued subpoena for documents seeking the production of medical records of plaintiff without providing to plaintiff a statement of rights and remedies in contravention of the duties imposed by Virginia Code § 32.1-127.1:03 that provided in pertinent part that provided in part that "In instances where medical records being subpoenaed are those of a ...nonparty witness, the party requesting or issuing the subpoena shall deliver to the ...nonparty witness together with the copy of the request for subpoena, or a copy of the subpoena in the case of an attorney-issued subpoena, a statement informing them of their rights and remedies...." including the following "NOTICE TO PATIENT

The attached document means that (insert name of party requesting or causing issuance of the subpoena) has either asked the court to issue a subpoena or a subpoena has been issued by the other party's attorney to your doctor or other health care providers (names of health care providers inserted here) requiring them to produce your medical records. Your doctor or other health care provider is required to respond by providing a copy of your medical records. If you believe your records should not be disclosed and object to their disclosure, you have the right to file a motion with the clerk of the court to quash the subpoena. You may contact the clerk's office to determine the requirements that must be satisfied when filing

a motion to quash and you may elect to contact an attorney to represent your interest. If you elect to file a motion to quash, it must be filed as soon as possible before the provider sends out the records in response to the subpoena. If you elect to file a motion to quash, you must notify your doctor or other health care provider(s) that you are filing the motion so that the provider knows to send the records to the clerk of court in a sealed envelope or package for safekeeping while your motion is decided.

56. The defendant Angela Smith acted by and through her agent as described above.

57. The defendant Dr. Kryzanowski delivered the medical records and disclosed the medical information and contents of the medical records to Deanna Cook, failed to protect and preserve the confidentiality of the her patient, the plaintiff, failing to refuse to comply with the attorney issued subpoena which did not meet the statutory requirements set forth in § 32.1-127.1:03, failing to notify the plaintiff of the receipt of a subpoena for the records, failing to move to quash the subpoena, failing to act in accordance with the duty of reasonable care of a health care provider owes to her patient, including but not limited to a duty and obligation by the health care provider to preserve the confidentiality of information about the patient which was communicated to the health care provider or discovered by the health care provider during the course of treatment as recognized by Fairfax Hospital v. Curtis, 254, Va. 437, 442, 492 S.E.2d 642 (1997) which provides no exception for attorney issued subpoena in contravention of Va. Code. § 32.1-127.1:03.

58. The disclosure by the defendants was voluntary.

59. The disclosure was not authorized by law.

60. The disclosure was not necessary in connection with the care of the patient or plaintiff.

61. The disclosure was not necessary in connection with the protection or enforcement any of the defendant's legal rights.
62. The disclosure was not done in order to comply with state or federal law.
63. The disclosure of information was not in conformity with the usual procedures in place designed to protect the confidential medical information of patients.
64. The defendants Leslie J. Krzanowski, Angela Smith and Deanna Cook had a duty to honor the implied promise of confidentiality of plaintiff's confidential medical and personal information.
65. The foregoing duty was not voided by any abuse of authority by an attorney issuing a subpoena pursuant to §§ 8.01-413, 16.1-89 or 16.1-265 of the Code of Virginia where no notice was provided to Beverly Smith as required by § 32.1-127.1:03.
66. When the patient does not manifestly place her medical condition at issue in a civil proceeding, then the statute requires a determination by a judicial officer whether there is a basis for disseminating the patient's confidential communications to third persons before the dissemination or disclosure.
67. Upon information and belief, no such determination was made.
68. Defendants Leslie J. Krzanowski, Angela Smith and Deanna Cook breached that duty by disclosing confidential information to unauthorized persons, including but not limited to plaintiff's son's attorney and to the court, Angela Smith and Deanna Cook.
69. Defendants Leslie J. Krzanowski, Angela Smith and Deanna Cook breached that duty by disclosing confidential information to unauthorized persons, including but not limited to plaintiff's son's attorney and to the court, Angela

Smith, Deanna Cook, and Deborah S. Tinsley, and violated the standard of care by disclosing confidential information to unauthorized persons.

70. As a direct and proximate result plaintiff has suffered physical injuries including loss of appetite, sleeplessness, nausea together with depression and other severe emotional injuries.

71. As a direct and proximate result plaintiff has suffered and will suffer serious physical, emotional and mental injuries together with past and future medical losses.

72. As a direct and proximate result of the breach and violation stated above, plaintiff suffered humiliation, embarrassment, and similar harm to her feelings, and is therefore entitled to damages for emotional distress and injuries which are presumed.

73. As a direct and proximate result of the breach and violation stated above, plaintiff suffered damages, including but not limited to the loss of privacy in her confidential personal and medical information.

Count 3
Malpractice against Dr. Leslie Krzanowski

74. Paragraphs 1 - 17 and 39 - 73 are incorporated herein.

75. Upon receipt of that information by the patient, the physician impliedly promises not to violate the confidence. Because the duty to honor the implied promise of confidentiality is but another component of the treatment rendered, the breach of that duty should be judged like the breach of the general duty. Thus, as with a violation of the standard of care generally, a breach of the duty of confidentiality, "resulting in damages, gives rise to a cause of action sounding in tort against the physician."

76. Defendant Leslie J. Krzanowski breached the terms of the promise and implied agreement that she had with plaintiff which resulted in past and future physical, emotional and mental injuries to the plaintiff together with past and future medical bills all of which were foreseeable at the time of the agreement to provide services and treatment

WHEREFORE, Plaintiff moves for judgment as follows:
a. As to Count 1 and 2, jointly and severally against Leslie J. Krzanowski, Angela Smith, and Deanna Cook in the amount of $250,000.00 in compensatory damages or such other amount as the law may allow, together with costs and attorneys fees in this matter expended; and
b. As to Count 1, plaintiff also prays for such further relief as may be provided by 42 U.S.C. § 1983.
c. As to Count 3, against Leslie J. Krzanowski in the amount of $250,000.00 in damages or such other amount as the law may allow, together with costs in this matter expended.
d. Such other and further relief as may be appropriate.

Trial by jury is demanded.

Respectfully Submitted:
BEVERLY SMITH

By: /s/
Counsel

Thomas H. Roberts, Esq.
VSB: # 26014
Thomas H. Roberts & Associates, P.C.
105 South 1st Street
Richmond, Virginia 23219-3718

Tele: (804) 783-2000
Fax: (804) 783-2105

TO:1804783 2105 P:2/4

SUBPOENA DUCES TECUM (CIVIL) -
ATTORNEY ISSUED VA. CODE §§ 8.01-411, 16.1-265,
Commonwealth of Virginia Supreme Court Rules 4:9

Case No. J10005182010001A0044450:00

January 30, 2003 at 9:30 a.m.
HEARING DATE AND TIME

Goochland Juvenile and Domestic Relations District Court
2939 River Road West, P.O. Box 47, Goochland, VA 23063
COURT ADDRESS

Angela D. Smith v/s Dean E. Smith

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:

You are commanded to summon

Dr. Leslie Kenyon-Jenkins, Patient's Psychiatrist
NAME
7501 Forest Avenue, Ste. 406
STREET ADDRESS
Richmond Virginia 23229
CITY STATE ZIP

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

SEE ATTACHED EXHIBIT "A"

at 701 E. Franklin St., Ste. 1500, Richmond, VA 23219-0826 on December 20, 2002 at 2:00 p.m.
LOCATION DATE AND TIME

to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This Subpoena Duces Tecum is issued by the attorney for and on behalf of

Angela D. Smith
PARTY NAME

Deanna D. Cook	32771
NAME OF ATTORNEY	VIRGINIA STATE BAR NUMBER
Brenner, Ivins, Cook & Marcus	(804) 543-1400
OFFICE ADDRESS	TELEPHONE NUMBER OF ATTORNEY
P.O. Box 826, Richmond, VA 23218-0826	(804) 543-1466
OFFICE ADDRESS	TELEPHONE NUMBER OF ATTORNEY
December 5, 2002	Deanna D. Cook
DATE ISSUED	SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

RETURN OF SERVICE (see page two of this form)

NAME OF PERSON SERVED (IF OTHER THAN NAMED ABOVE)

DATE AND TIME OF SERVICE

EXHIBIT 1

BEST AVAILABLE COPY

TO the person summoned:

If you are served with this subpoena less than 14 days prior to the date first compliance with this subpoena is required, you may object by certifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

X This SUBPOENA DUCES TECUM is being served by a private process server who must provide proof of service in accordance with Va. Code § 8.01-325

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME _____

ADDRESS _____

☐ PERSONAL SERVICE (a) to _____

(b) No _____

Being unable to make personal service, a copy was delivered in the following manner:

☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above.

_____

☐ Posted on front door or such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ not found _____, Sheriff

_____, Deputy Sheriff

DATE

CERTIFICATE OF COUNSEL

I, Deanna D. Cote, counsel for Angela D. Smith, hereby certify that a copy of the foregoing subpoena duces tecum was mailed to James M. Trautman counsel of record for Sean B. Smith on the 5th day of December, 2002.

Deanna D. Cote
Counsel for Angela D. Smith

[illegible]

[illegible]

EXHIBIT "A"

Produce the originals or legible copies of the following documents to the law offices of Bremner, Janus, Cook & Marcus, 701 E. Franklin Street, Ste. 1500, Richmond, VA 23219, on or before December 23, 2002 at 3:00 p.m.:

Copies of the full and complete file, omitting nothing, of Beverly Smith, (current address: 1284 Marlin Road, Goochland, VA 23063), including but not limited to, all examination reports and notes; medical histories and consultation reports; correspondence to and from the above-named individuals other physicians; correspondence to and from family members of the above-named individuals; progress and office notes and nurses' notes; psychological, psychiatric and neuropsychological test data, tests scores, test answers, raw data and evaluation and consultation reports; therapy reports and in-progress notes; statements and reports of condition, treatment, diagnosis and prognosis; hospital admission and discharge reports; emergency medical care reports, laboratory tests results and reports, bills and/or statements, from the beginning of treatment through the present.

APPENDIX E

VA CODE § 32.1-127.1:03, AS AMENDED IN 2002

§ 32.1-127.1:03. Patient health records privacy.

A. There is hereby recognized a patient's right of privacy in the content of a patient's medical record. Patient records are the property of the provider maintaining them, and, except when permitted by this section or by another provision of state or federal law, no provider, or other person working in a health care setting, may disclose the records of a patient.

Patient records shall not be removed from the premises where they are maintained without the approval of the provider, except in accordance with a court order or subpoena consistent with § 8.01-413 C or with this section or in accordance with the regulations relating to change of ownership of patient records promulgated by a health regulatory board established in Title 54.1.

No person to whom disclosure of patient records was made by a patient or a provider shall redisclose or otherwise reveal the records of a patient, beyond the purpose for which such disclosure was made, without first obtaining the patient's specific consent to such redisclosure. This redisclosure prohibition shall not, however, prevent (i) any provider who receives records from another provider from making subsequent disclosures as permitted under this section or (ii) any provider from furnishing records and aggregate or other data, from which patient-identifying prescription information has been removed, encoded or encrypted, to qualified

researchers, including, but not limited to, pharmaceutical manufacturers and their agents or contractors, for purposes of clinical, pharmaco-epidemiological, pharmaco-economic, or other health services research.

B. As used in this section:

"Agent" means a person who has been appointed as a patient's agent under a power of attorney for health care or an advance directive under the Health Care Decisions Act (§ 54.1-2981 et seq.).

"Guardian" means a court-appointed guardian of the person.

"Health services" includes, but is not limited to, examination, diagnosis, evaluation, treatment, pharmaceuticals, aftercare, habilitation or rehabilitation and mental health therapy of any kind.

"Parent" means a biological, adoptive or foster parent.

"Patient" means a person who is receiving or has received health services from a provider.

"Patient-identifying prescription information" means all prescriptions, drug orders or any other prescription information that specifically identifies an individual patient.

"Provider" shall have the same meaning as set forth in the definition of "health care provider" in § 8.01-581.1, except that state-operated facilities shall also be considered providers for the purposes of this section. Provider shall also include all persons who are licensed, certified, registered or

permitted by any of the health regulatory boards within the Department of Health Professions, except persons regulated by the Board of Funeral Directors and Embalmers or the Board of Veterinary Medicine.

"Record" means any written, printed or electronically recorded material maintained by a provider in the course of providing health services to a patient concerning the patient and the services provided. "Record" also includes the substance of any communication made by a patient to a provider in confidence during or in connection with the provision of health services to a patient or information otherwise acquired by the provider about a patient in confidence and in connection with the provision of health services to the patient.

C. The provisions of this section shall not apply to any of the following:

1. The status of and release of information governed by §§ 65.2-604 and 65.2-607 of the Virginia Workers' Compensation Act; or

2. Except where specifically provided herein, the records of minor patients.

D. Providers may disclose the records of a patient:

1. As set forth in subsection E of this section, pursuant to the written consent of the patient or in the case of a minor patient, his custodial parent, guardian or other person authorized to consent to treatment of minors pursuant to § 54.1-2969; also, in emergency cases or situations where it is

impractical to obtain the patient's written consent, pursuant to the patient's oral consent for a provider to discuss the patient's records with a third party specified by the patient;

2. In compliance with a subpoena issued in accord with subsection H of this section, pursuant to court order upon good cause shown or in compliance with a subpoena issued pursuant to subsection C of § 8.01-413;

3. In accord with subsection F of § 8.01-399 including, but not limited to, situations where disclosure is reasonably necessary to establish or collect a fee or to defend a provider or the provider's employees or staff against any accusation of wrongful conduct; also as required in the course of an investigation, audit, review or proceedings regarding a provider's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity;

4. In testimony in accordance with §§ 8.01-399 and 8.01-400.2;

5. In compliance with the provisions of § 8.01-413;

6. As required or authorized by any other provision of law including contagious disease, public safety, and suspected child or adult abuse reporting requirements, including, but not limited to, those contained in §§ 32.1-36, 32.1-36.1, 32.1-40, 32.1-41, 32.1-276.5, 32.1-283, 32.1-283.1, 37.1-98.2, 53.1-40.10, 54.1-2403.3, 54.1-2906, 54.1-2907, 54.1-2966, 54.1-2966.1, 54.1-2967, 54.1-2968, 63.1-55.3 and 63.1-248.11 63.1-248.3;

7. Where necessary in connection with the care of the patient, including in the implementation of a hospital routine contact process;

8. In the normal course of business in accordance with accepted standards of practice within the health services setting; however, the maintenance, storage, and disclosure of the mass of prescription dispensing records maintained in a pharmacy registered or permitted in Virginia shall only be accomplished in compliance with §§ 54.1-3410, 54.1-3411 and 54.1-3412;

9. When the patient has waived his right to the privacy of the medical records;

10. When examination and evaluation of a patient are undertaken pursuant to judicial or administrative law order, but only to the extent as required by such;

11. To the guardian ad litem in the course of a guardianship proceeding of an adult patient authorized under Article 1.1 (§ 37.1-134.6 et seq.) of Chapter 4 of Title 37.1;

12. To the attorney appointed by the court to represent a patient in a civil commitment proceeding under § 37.1-67.3;

13. To the attorney and/or guardian ad litem of a minor patient who represents such minor in any judicial or administrative proceeding, provided that the court or administrative hearing officer has entered an order granting the attorney or guardian ad litem this right and such attorney or guardian ad litem presents evidence to the provider of such order;

14. With regard to the Court-Appointed Special Advocate (CASA) program, a minor's records in accord with § 9.1-156;

15. To an agent appointed under a patient's power of attorney or to an agent or decision maker designated in a patient's advance directive for health care or for decisions on anatomical gifts and organ, tissue or eye donation or to any other person consistent with the provisions of the Health Care Decisions Act (§ 54.1-2981 et seq.);

16. To third-party payors and their agents for purposes of reimbursement;

17. As is necessary to support an application for receipt of health care benefits from a governmental agency or as required by an authorized governmental agency reviewing such application or reviewing benefits already provided;

18. Upon the sale of a medical practice as provided in § 54.1-2405; or upon a change of ownership or closing of a pharmacy pursuant to regulations of the Board of Pharmacy;

19. In accord with § 54.1-2400.1 B, to communicate a patient's specific and immediate threat to cause serious bodily injury or death of an identified or readily identifiable person;

20. To the patient, except as provided in subsections E and F of this section and subsection B of § 8.01-413;

21. In the case of substance abuse records, when permitted by and in conformity with requirements of federal law found in 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2;

22. In connection with the work of any entity established as set forth in § 8.01-581.16 to evaluate the adequacy or quality of professional services or the competency and qualifications for professional staff privileges;

23. If the records are those of a deceased or mentally incapacitated patient to the personal representative or executor of the deceased patient or the legal guardian or committee of the incompetent or incapacitated patient or if there is no personal representative, executor, legal guardian or committee appointed, to the following persons in the following order of priority: a spouse, an adult son or daughter, either parent, an adult brother or sister, or any other relative of the deceased patient in order of blood relationship;

24. For the purpose of conducting record reviews of inpatient hospital deaths to promote identification of all potential organ, eye, and tissue donors in conformance with the requirements of applicable federal law and regulations, including 42 C.F.R. § 482.45, (i) to the provider's designated organ procurement organization certified by the United States Health Care Financing Administration and (ii) to any eye bank or tissue bank in Virginia certified by the Eye Bank Association of America or the American Association of Tissue Banks;

25. To the Office of the Inspector General for Mental Health, Mental Retardation and Substance Abuse Services pursuant to Chapter 16 (§ 37.1-255 et seq.) of Title 37.1; and

26. (Expires July 1, 2003) To an entity participating in the activities of a local health partnership authority established

pursuant to Article 6.1 (§ 32.1-122.10:001 et seq.) of Chapter 4 of Title 32.1, pursuant to subdivision D 1 of this section.

E. Requests for copies of medical records shall (i) be in writing, dated and signed by the requester; (ii) identify the nature of the information requested; and (iii) include evidence of the authority of the requester to receive such copies and identification of the person to whom the information is to be disclosed. The provider shall accept a photocopy, facsimile, or other copy of the original signed by the requestor as if it were an original. Within fifteen days of receipt of a request for copies of medical records, the provider shall do one of the following: (i) furnish such copies to any requester authorized to receive them; (ii) inform the requester if the information does not exist or cannot be found; (iii) if the provider does not maintain a record of the information, so inform the requester and provide the name and address, if known, of the provider who maintains the record; or (iv) deny the request (a) under subsection F, (b) on the grounds that the requester has not established his authority to receive such records or proof of his identity, or (c) as otherwise provided by law. Procedures set forth in this section shall apply only to requests for records not specifically governed by other provisions of this Code, federal law or state or federal regulation.

F. Except as provided in subsection B of § 8.01-413, copies of a patient's records shall not be furnished to such patient or anyone authorized to act on the patient's behalf where the patient's attending physician or the patient's clinical psychologist has made a part of the patient's record a written statement that, in his opinion, the furnishing to or review by the patient of such records would be injurious to the patient's

health or well-being. If any custodian of medical records denies a request for copies of records based on such statement, the custodian shall permit examination and copying of the medical record by another such physician or clinical psychologist selected by the patient, whose licensure, training and experience relative to the patient's condition are at least equivalent to that of the physician or clinical psychologist upon whose opinion the denial is based. The person or entity denying the request shall inform the patient of the patient's right to select another reviewing physician or clinical psychologist under this subsection who shall make a judgment as to whether to make the record available to the patient. Any record copied for review by the physician or clinical psychologist selected by the patient shall be accompanied by a statement from the custodian of the record that the patient's attending physician or clinical psychologist determined that the patient's review of his record would be injurious to the patient's health or well-being.

G. A written consent to allow release of patient records may, but need not, be in the following form:

CONSENT TO RELEASE OF CONFIDENTIAL HEALTH CARE

INFORMATION

Patient Name.....
Provider Name.....
Person, agency or provider to whom disclosure is to be made.....
Information or Records to be disclosed.....

As the person signing this consent, I understand that I am giving my permission to the above-named provider or other named third party for disclosure of confidential health care records. I also understand that I have the right to revoke this consent, but that my revocation is not effective until delivered in writing to the person who is in possession of my records. A copy of this consent and a notation concerning the persons or agencies to whom disclosure was made shall be included with my original records. The person who receives the records to which this consent pertains may not redisclose them to anyone else without my separate written consent unless such recipient is a provider who makes a disclosure permitted by law.

This consent expires on (date).....

Signature of Patient..... Date.....

H. 1. No party to an action shall request the issuance of a subpoena duces tecum for an opposing party's medical records or cause a subpoena duces tecum to be issued by an attorney unless a copy of the request for the subpoena or a copy of the attorney-issued subpoena is provided to opposing counsel or the opposing party if they are pro se, simultaneously with filing the request or issuance of the subpoena. No party to an action shall request or cause the issuance of a subpoena duces tecum for the medical records of a nonparty witness unless a copy of the request for the subpoena or a copy of the attorney-issued subpoena is provided to the nonparty witness simultaneously with filing the request or issuance of the attorney-issued subpoena.

In instances where medical records being subpoenaed are those of a pro se party or nonparty witness, the party requesting or issuing the subpoena shall deliver to the pro se party or nonparty witness together with the copy of the request for subpoena, or a copy of the subpoena in the case of an attorney-issued subpoena, a statement informing them of their rights and remedies. The statement shall include the following language and the heading shall be in boldface capital letters:

NOTICE TO PATIENT

The attached document means that (insert name of party requesting or causing issuance of the subpoena) has either asked the court to issue a subpoena or a subpoena has been issued by the other party's attorney to your doctor or other health care providers (names of health care providers inserted here) requiring them to produce your medical records. Your doctor or other health care provider is required to respond by providing a copy of your medical records. If you believe your records should not be disclosed and object to their disclosure, you have the right to file a motion with the clerk of the court to quash the subpoena. You may contact the clerk's office to determine the requirements that must be satisfied when filing a motion to quash and you may elect to contact an attorney to represent your interest. If you elect to file a motion to quash, it must be filed as soon as possible before the provider sends out the records in response to the subpoena. If you elect to file a motion to quash, you must notify your doctor or other health care provider(s) that you are filing the motion so that the provider knows to send the records to the clerk of court in a sealed envelope or package for safekeeping while your motion is decided.

2. Any party filing a request for a subpoena duces tecum or causing such a subpoena to be issued for a patient's medical records shall include a Notice to Providers in the same part of the request where the provider is directed where and when to return the records. Such notice shall be in boldface capital letters and shall include the following language:

NOTICE TO PROVIDERS

IF YOU RECEIVE NOTICE THAT YOUR PATIENT HAS FILED A MOTION TO QUASH (OBJECTING TO) THIS SUBPOENA, OR IF YOU FILE A MOTION TO QUASH THIS SUBPOENA, SEND THE RECORDS ONLY TO THE CLERK OF THE COURT WHICH ISSUED THE SUBPOENA OR IN WHICH THE ACTION IS PENDING AS SHOWN ON THE SUBPOENA USING THE FOLLOWING PROCEDURE: PLACE THE RECORDS IN A SEALED ENVELOPE AND ATTACH TO THE SEALED ENVELOPE A COVER LETTER TO THE CLERK OF COURT WHICH STATES THAT CONFIDENTIAL HEALTH CARE RECORDS ARE ENCLOSED AND ARE TO BE HELD UNDER SEAL PENDING THE COURT'S RULING ON THE MOTION TO QUASH THE SUBPOENA. THE SEALED ENVELOPE AND THE COVER LETTER SHALL BE PLACED IN AN OUTER ENVELOPE OR PACKAGE FOR TRANSMITTAL TO THE COURT.

3. Health care providers shall provide a copy of all records as required by a subpoena duces tecum or court order for such medical records. If the health care provider has, however, actual receipt of notice that a motion to quash the subpoena

has been filed or if the health care provider files a motion to quash the subpoena for medical records, then the health care provider shall produce the records to the clerk of the court issuing the subpoena or in whose court the action is pending, where the court shall place the records under seal until a determination is made regarding the motion to quash. The securely sealed envelope shall only be opened on order of the judge. In the event the court grants the motion to quash, the records shall be returned to the health care provider in the same sealed envelope in which they were delivered to the court. In the event that a judge orders the sealed envelope to be opened to review the records in camera, a copy of the judge's order shall accompany any records returned to the provider. The records returned to the provider shall be in a securely sealed envelope.

4. It is the duty of any party requesting a subpoena duces tecum for medical records or the attorney issuing the subpoena duces tecum to determine whether the patient whose records are sought is pro se or a nonparty. Any request for a subpoena duces tecum and any attorney-issued subpoena for the medical records of a nonparty or of a pro se party shall direct the provider (in boldface type) not to produce the records until ten days after the date on which the provider is served with the subpoena duces tecum and shall be produced no later than twenty days after the date of such service.

In the event that the individual whose records are being sought files a motion to quash the subpoena, the court shall decide whether good cause has been shown by the discovering party to compel disclosure of the patient's private records over the patient's objections. In determining whether

good cause has been shown, the court shall consider (i) the particular purpose for which the information was collected; (ii) the degree to which the disclosure of the records would embarrass, injure, or invade the privacy of the individual; (iii) the effect of the disclosure on the individual's future health care; (iv) the importance of the information to the lawsuit or proceeding; and (v) any other relevant factor.

The provisions of this subsection have no application to subpoenas for medical records requested under § 8.01-413, or issued by a duly authorized administrative agency conducting an investigation, audit, review or proceedings regarding a provider's conduct. The provisions of this subsection apply to the medical records of both minors and adults.

A subpoena for substance abuse records must conform to the requirements of federal law found in 42 C.F.R. Part 2, Subpart E.

Providers may testify about the medical records of a patient in compliance with §§ 8.01-399 and 8.01-400.2.

No. 06-561

In The Supreme Court of the United States

BEVERLY SMITH,

Petitioner,

v.

LESLIE J. KRYZANOWSKI, ANGELA SMITH, and DEANNA COOK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF DEANNA COOK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Deanna Cook ("Cook"), by counsel, respectfully submits that Petitioner Beverly Smith's ("Smith") Petition for Writ of Certiorari should be denied, and that the Court should decline to review this case.

OPINIONS BELOW

The July 26, 2006 Opinion of the Supreme Court of Virginia is attached to Smith's Petition at Appendix A. In that Opinion, the Court found that "there is no reversible error in the judgment complained of," and the Court accordingly denied Smith's petition for an appeal. Smith was seeking an appeal from a January 19, 2006 Order of the Circuit Court of the City of Richmond, Virginia, dismissing her claim under 42 U.S.C. § 1983 and dismissing various state-law claims, against Cook and other defendants.

JURISDICTION

Smith filed her Motion for Judgment in the Circuit Court for the City of Richmond, Virginia, alleging state law claims as well as her claim under 42 U.S.C. § 1983 against the various private party defendants. Following the Circuit Court's dismissal of her claims, Smith petitioned for an appeal to the Supreme Court of Virginia. This Court has jurisdiction to review (or decline to review) the decision of that Court not to grant Smith's petition with respect to Smith's claim under 42 U.S.C. § 1983.[1]

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[1] Smith's Petition for Certiorari addresses only her claim that Cook is liable as a "state actor" under 42 U.S.C. § 1983, and not to her separate state law negligence claim.

STATEMENT OF THE UNDERLYING PROCEEDINGS AND THIS CASE

Smith is the paternal grandmother of Stone Wyatt Smith, a minor who was the subject of a custody and visitation dispute in the Juvenile and Domestic Relations Court of Gouchland County, Virginia ("J & D Court"). See Amended Motion for Judgment, ¶ 5, attached to Smith's Petition as Appendix D. The child's parents are Angela Dawn Smith and Dean E. Smith. Id. Cook represented Angela Smith in the J & D Court proceedings. Id., ¶ 4.

On August 8, 2002, the J & D Court entered a Temporary Order, expressly providing that "[d]uring the periods that child is with the father, the child shall ***not*** be left alone with Paternal Grandmother." (Emphasis supplied). A copy of that Temporary Order is attached hereto as Appendix A and was submitted in support of Cook's demurrer. Smith was at the time living with her son, and the J & D Court's express direction that the child not be left alone with Smith resulted from an issue being raised as to whether the child was safe in Smith's presence.

The J & D Court's Temporary Order further provided that a full hearing would be held on January 30, 2003, to address all custody and visitation issues. See Temporary Order (Appendix A). The hearing was held on the scheduled date, and the J & D Court subsequently entered its Pendente Lite Order dated March 13, 2003. A copy of that Pendente Lite Order is attached hereto as Appendix B and was submitted in support of Cook's demurrer. Notably, even the second Pendente Lite Order expressly provided that "[t]he child shall ***not*** be alone with the paternal grandmother." (Emphasis supplied).

In advance of the scheduled hearing, Cook was advised by Dean Smith's attorney, James A. Nachman,

Esquire, that he intended to call Dr. Leslie J. Kryzanowski to testify in support of his client's case. Dr. Kryzanowski was Smith's psychiatrist, and Smith's fitness was directly at issue in the custody proceedings. Cook therefore issued a subpoena, with a copy sent to Mr. Nachman, directing Dr. Kryzanowski to produce her file relating to her treatment of Smith. A copy of the subpoena is attached hereto as Appendix C. Attorney Nachman also issued a subpoena for Dr. Kryzanowski to testify at the scheduled January 30, 2003 hearing. A copy of that subpoena is attached hereto as Appendix D.[2]

A copy of Cook's subpoena was therefore served on Mr. Nachman, who appeared to Cook to be serving as counsel for Beverly Smith as well as her son. Cook did not copy Smith directly with her subpoena to Dr. Kryzanowski, but neither did Nachman (who presumably informed Smith that he had issued a subpoena to Dr. Kryzanowski).

On October 28, 2004, Smith (represented by her current counsel) filed a Motion for Judgment, accusing Cook and other defendants of "Constitutional violations" actionable under 42 U.S.C. § 1983 (Count I), and further accusing Cook and other defendants of "negligence"

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[2] Indeed, Smith had expressly and in writing waived any privilege and consented to having Dr. Kryzanowski testify at the hearing. By letter dated July 8, 2002, Smith advised Mr. Nachman that she was granting permission for him to speak with her and for Dr. Kryzanowski to testify in court. A copy of that letter is attached hereto as Appendix E. Mr. Nachman then wrote to Cook, advising her that "we are prepared to have Mrs. Smith's psychologist to [sic] testify or produce an Affidavit stating that it is perfectly acceptable for Stone to be in the company of his paternal grandmother." A copy of that letter is attached hereto as Appendix F. Although these two letters were conveniently not referenced in or attached to Smith's amended pleading, the trial court's power to sustain Cook's demurrer did not depend upon consideration of these documents.

(Count II).[3] Smith essentially complained that Cook invaded her "privacy" by issuing the subpoena for Dr. Kryzanowski's records, without specifically providing her a copy of the subpoena. Notably, Smith did not raise any complaint that her son's attorney issued a subpoena to Dr. Kryzanowski, directing that she appear at the J & D Court to give testimony as to her mental condition and fitness to be alone with the infant.

Moreover, Smith failed to allege that, even if she *had* sought to object to the subpoena for Dr. Kryzanowski's records, the J & D Court would have quashed the subpoena and refused to require production of the documents. In fact, Smith had been seeing a psychiatrist for serious psychiatric problems for some ten years *before* Cook issued the subpoena for Dr. Kryzanowski's records, and the J & D Court had repeatedly ruled (as a result of those problems) that Smith could not be left alone with the minor child. In addition, Smith failed to allege that Dr. Kryzanowski's records were disseminated to any third parties outside the relevant court proceedings.

Following a hearing on the defendants' demurrers and pleas, the trial court issued a Letter Opinion dated June 2, 2005, sustaining Cook's demurrer to Counts I and II. The trial court ruled that Smith's pleading failed to allege any state action as required for a claim under 42 U.S.C. § 1983, and that "even under liberal pleading rules applicable to claims of negligence, the plaintiff has failed to allege a cause of action for negligence." The trial court's rulings were then incorporated into an Order entered on June 27, 2005.

Because of an impending trial date in the case, Cook and the other defendants were compelled to incur the time and expense of discovery, which only confirmed the frivolousness of the claims being asserted. For example,

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[3] Additional counts were also asserted against other defendants.

Smith's counsel took the deposition of Dr. Kryzanowski, who testified that she met with Smith three days after receiving the documents subpoena issued by Cook in the underlying custody case, that it was her practice always to discuss such a subpoena with the patient, that she has no reason to believe she did not follow her practice in this case, and that she would not have released the records without Smith's express authorization. Likewise, Smith's son (Dean Smith) testified in deposition that he recalled Cook's subpoena being discussed at the dinner table with his mother.

Smith filed her "First Amended Motion for Judgment" on June 15, 2005. The amended pleading repeated the same claims against Cook that were previously dismissed upon Cook's initial demurrer, *i.e.* a civil rights claim under 42 U.S.C. § 1983 and a negligence claim. Despite additional verbiage, there were no additional facts alleged in the amended pleading to support any claim against Cook (or the other defendants).

Cook and the other defendants thereupon filed their demurrers and pleas in response to the amended pleading. A hearing was held on October 11, 2005, after which the trial court issued a Letter Opinion dated October 17, 2005, sustaining Cook's demurrer to Smith's civil rights claim without leave to amend. The trial court, at that time, overruled Cook's demurrer to Smith's negligence claim.

Cook thereupon filed her motion for reconsideration and/or for summary judgment, with respect to Smith's negligence claim under Count II. Following argument, the Court issued its Letter Opinion dated November 22, 2005, sustaining Cook's demurrer to Count II without leave to amend. The Court ruled that the amended pleading failed to allege any recoverable damages. The trial court entered a final Order on January 19, 2006, sustaining the demurrers of Cook and the other

defendants, and dismissing Smith's Amended Motion for Judgment with prejudice.

As noted above, the Supreme Court of Virginia refused to grant Smith's petition for appeal by Opinion dated July 26, 2006.

REASONS FOR DENYING THE WRIT

As demonstrated below, there is no compelling reason for this Court to grant a writ of certiorari in this case. The Richmond Circuit Court correctly dismissed Smith's lawsuit, and the Supreme Court of Virginia correctly declined to grant Smith's appeal. Neither decision conflicts with any decision by this Court, or with any decision of another state court of last resort or a United States court of appeals. Moreover, both the Circuit Court decision and the Supreme Court of Virginia's decision at issue are unpublished. Smith fails to cite any case supporting her contention that a private attorney who invokes state subpoena procedures is a "state actor" subject to civil rights claims under 42 U.S.C. § 1983.

I. Smith Failed to Allege any Facts Showing that Cook Acted under Color of State Law.

Smith's lawsuit is but the latest in a disturbingly long line of frivolous civil rights claims asserted by disgruntled litigants, who turn their frustration and wrath against attorneys, judges, adverse parties, and other participants in the judicial system:

> **This action, filed [pro se], is a typical example of the kind of action being filed with increasing frequency under the provisions of the Civil Rights Act of 1871, 42 U.S.C. §§ 1981-1986. Having been defeated in state court proceedings and being unhappy and somewhat humiliated and frustrated by**

> **the results of such proceedings, these persons lash out at judges, attorneys, witnesses, court functionaries, newspapers and anyone else in convenient range, terming all of them corruptly evil and charging them with perjury and conspiracy in a last desperate effort to re-litigate the issues on which they have once lost and hoping to secure sizeable damages to boot.**

Jemzura v. Belden, 281 F. Supp. 200, 204 (N.D.N.Y. 1968) (emphasis added), quoting Shakespeare v. Wilson, 40 F.R.D. 500, 502 (S.D. Cal. 1966).

In this case, Smith was merely upset that the J & D Court, charged with considering the best interests of the child, determined that the child should not be left alone with her. Smith's lawsuit was therefore a collateral attack on the J & D Court's ruling, under the guise of a "civil rights" claim against some of those who participated in the custody proceedings.

The courts in Virginia and elsewhere have routinely dismissed civil rights claims against attorneys and others involved in prior litigation, often with an award of sanctions against the plaintiff. See Davis v. Hudgins, 896 F. Supp. 561 (E.D. Va. 1995) (dismissing civil rights claims against attorneys and others, and awarding Rule 11 sanctions against *pro se* plaintiff), aff'd, 87 F.3d 1308 (4th Cir. 1996), cert. denied, 520 U.S. 1172, 117 S. Ct. 1440, 137 L. Ed. 2d 546 (1997); Snyder-Falkinham v. Stockburger, 1996 WL 1171800 (W.D. Va., Aug. 5, 1996) (dismissing civil rights claims by disgruntled state court litigant against attorneys and law firms, and awarding Rule 11 sanctions against plaintiff and her counsel), aff'd,

2002 WL 31829717 (4th Cir. 2002), cert. denied, __ U.S. __, 123 S. Ct. 2645, 156 L. Ed. 2d 658 (2003).[4]

Moreover, the courts have consistently rejected Smith's argument that an attorney who invokes state subpoena procedures is a "state actor" subject to civil rights claims under 42 U.S.C. § 1983. See, e.g., Angelico v. Lehigh Valley Hospital, Inc., 184 F.3d 268, 278 (10th Cir. 1999) ("We hold, therefore, that an attorney does not become a state actor simply by employing the state's subpoena laws.") (dismissing civil rights claim under Section 1983 against attorneys who issued subpoenas for documents); Hahn v. Star Bank, 190 F.3d 708, 717 (6th Cir. 1999) ("[W]e now put this circuit on record as holding that a private attorney issuing a subpoena does not become a state actor for the purposes of § 1983.") (affirming summary judgment dismissal of civil rights claims), cert. denied, 529 U.S. 1020, 120 S.Ct. 1423, 146 L.Ed.2d 314 (2000); Barnard v. Young, 720 F.2d 1188, 1189 (10th Cir. 1983) ("Plaintiff's allegation that the attorney acted under color of state law when he employed the device of a subpoena duces tecum does not rise to the level of acting together with or obtaining significant aid from state officials. Nor is the conduct otherwise chargeable to the state.... [T]he attorney does not become

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[4] See also Briscoe v. LaHue, 663 F.2d 713 (7th Cir. 1981) (affirming dismissal of civil rights claims against former criminal defense counsel, prosecutors, trial judges, witnesses and court reporters), aff'd, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983); Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975) (affirming dismissal of civil rights claims against public defender, prosecutor, state judges and state investigatory); Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965) (dismissing civil rights claims by litigant against judges, attorney and bailiff); Raitport v. Provident National Bank, 451 F. Supp. 522 (E.D. Pa. 1978) (dismissing civil rights claims against, inter alia, counsel for plaintiff's creditors); Hamilton v. Jamieson, 355 F. Supp. 290 (E.D. Pa. 1973) (dismissing civil rights claims against judges, prosecutors and defense attorneys); Jemzura v. Belden, supra (dismissing civil rights claim against state officials and attorneys by unsuccessful litigant in marital litigation).

a state actor merely by employing state authorized subpoena power.") (affirming dismissal of civil rights action against attorney); Dyess v. Louisiana State University Board of Supervisors, 2005 WL 2060915 (E.D. La., Aug. 19, 2005) ("Other circuits have consistently held that an attorney cannot fairly be said to have become a state actor merely because he issues a subpoena.... This Court concurs with these decisions and holds that a private attorney's issuance of a subpoena does not make the attorney a state actor for purposes of § 1983.") (dismissing civil rights claims against attorneys) (unpublished); Bochetto v. Labrum & Doak, LLP, 1997 WL 560191 (E.D. Pa., Aug. 28, 1997) ("It follows, according to plaintiffs, that the issuance of a subpoena by a private party can be fairly attributable to the state, and thus state action exists. I disagree.") (dismissing civil rights claims against attorneys) (unpublished).[5]

II. The Opinions of the Richmond Circuit Court and the Supreme Court of Virginia Did Not Decide any Important Question of Unsettled Federal Law, or Conflict with any Decision of Another State Court of Last Resort or any United States Circuit Court.

The issue presented in this case, *i.e.* whether a private attorney is a state actor for purposes of 42 U.S.C. § 1983 when invoking state subpoena procedure, is not unsettled. Rather, as demonstrated by the cases cited above, the courts have consistently held that such

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[5] See also Smith v. Hilltop Basic Resources, Inc., 99 Fed. Appx. 644, 649 (6th Cir. 2004) ("*Hahn* dictates that a private attorney issuing a subpoena does not become a state actor for the purposes of section 1983. Plaintiffs' tenuous efforts to extend the state action rationale ... to Hilltop, which merely issued subpoenas and opposed plaintiffs' motion to quash, are unavailing. Plaintiffs simply cannot establish action under color of state law.") (affirming dismissal of civil rights claims) (unpublished).

conduct is *not* state action that will support a civil rights claim. Likewise, Smith does not cite *any* case in her Petition in which it was held otherwise.

As a result, Smith has not presented any reason for this Court to exercise its discretion to grant her petition.

CONCLUSION

For the foregoing reasons, Respondent Deanna Cook respectfully request that the Petition for Writ of Certiorari be denied.

Deanna Cook

By: /s/
Counsel

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APPENDIX A

VIRGINIA: GOOCHLAND JUVENILE AND DOMESTIC RELATIONS COURT

IN RE: Stone Wyatt Smith
FILE NO. JJ-5582-01

The following parties were present:

( ) Juvenile (x) G.A.L.

(x) Father (x) Atty. For Father

(x) Mother (x) Atty. For Mother

( ) DSS Representative ( ) Atty. For DSS

Type of Case: ( ) Felony ( ) Misdemeanor ( ) CHINS (x) Custody ( ) Visitation ( ) Support Order ( ) Motion to Amend ( ) Other

Type of Hearing: ( ) Determination/appointment of counsel ( ) Detention Hearing ( ) Transfer Hearing ( ) Adjudicatory Hearing ( ) Disposition Hearing ( ) Continuance ( ) Review ( ) Show Cause ( ) Trial (x) Status and to Set Temporary Order

Plea: ( ) guilty ( ) not Guilty

IT IS ORDERED THAT:

The Parties will share custody on a week to week basis with Dad having the child beginning August 9, 2002 at 4:35 pm. Child will return to Mother on Friday August 16, 2002 at 5:45 pm. Exchange of child will take place at the babysitters residence, Glenda Mosely, and said visitation shall continue on a week to week basis thereafter.

The Parties will continue to utilize the current babysitter Glenda Mosely. The parties will provide the other parent first option when a babysitter is needed outside the regular schedule with Glenda Mosely or when she may be unavailable.

THIS CASE IS CONTINUED TO Full Hearing on January 30 2003 at 9:30 in Charlottesville

August 8, 2002
Date

Edward J. Berry
Edward Dej. Berry, Judge

VIRGINIA: GOOCHLAND JUVENILE AND DOMESTIC RELATIONS COURT

IN RE:
FILE NO.

The following parties were present:

( ) Juvenile ( ) G.A.L.

( ) Father ( ) Atty. For Father

( ) Mother ( ) Atty. For Mother

( ) DSS Representative ( ) Atty. For DSS

Type of Case: ( ) Felony ( ) Misdemeanor ( ) CHINS ( ) Custody ( ) Visitation ( ) Support Order ( ) Motion to Amend ( ) Other

Type of Hearing: ( ) Determination/appointment of counsel ( ) Detention Hearing ( ) Transfer Hearing ( ) Adjudicatory Hearing ( ) Disposition Hearing ( ) Continuance ( ) Review ( ) Show Cause ( ) Trial ( ) _____

Plea: ( ) guilty ( ) not Guilty

IT IS ORDERED THAT:

During the periods that child is with the father the child shall not be left alone with paternal grandmother.

If either parent takes the child out of town for a period of 24 hours or more then that parent shall notify the other parent of where the child will be and provide contact information.

Both parties are hereby referred to their local community services board or private provider for SA evaluations to include random urine screens. A report shall be filed with the court and GAL.

THIS CASE IS CONTINUED TO Full hearing - Jan. 30, 2003 at 9:30 in Charlottesville

August 8, 2002
Date

Edward J. Berry
Edward Dej. Berry, Judge

VIRGINIA: GOOCHLAND JUVENILE AND DOMESTIC RELATIONS COURT

IN RE:
FILE NO.

The following parties were present:

( ) Juvenile ( ) G.A.L.

( ) Father ( ) Atty. For Father

( ) Mother ( ) Atty. For Mother

( ) DSS Representative ( ) Atty. For DSS

Type of Case: ( ) Felony ( ) Misdemeanor ( ) CHINS ( ) Custody ( ) Visitation ( ) Support Order ( ) Motion to Amend ( ) Other

Type of Hearing: ( ) Determination/appointment of counsel ( ) Detention Hearing ( ) Transfer Hearing ( ) Adjudicatory Hearing ( ) Disposition Hearing ( ) Continuance ( ) Review ( ) Show Cause ( ) Trial ( ) _____

Plea: ( ) guilty ( ) not Guilty

IT IS ORDERD THAT:

Both Parties are hereby referred to Dr. Tim Amster for individual psychological evaluations. Sessions shall include the minor child at the direction of Dr. Amster. Dr. Amster shall have the opportunity to observe interaction between each parent and the minor child. A report shall be filed with the court and GAL.

Holidays will be shared: Thanksgiving Holiday - Dad will keep child from 11/15 - 11/24 and 11/24 - 11/27 child w/

mom; Da[illegible]ll then get child on 11/27 - 11/28 at 2 pm. Mom will [illegible]arn child 12/1 at 6 pm to [illegible] child's Birthday - Dad shall have child on Sat 4/14 at 6pm until Sun, 9/15 at 12:00 pm

THIS CASE IS CONTINUED TO Full hearing on January 30, 2003 at 9:30 am in Charlottesville

August 8, 2002
Date

Edward J. Berry
Edward Dej. Berry, Judge

VIRGINIA: GOOCHLAND JUVENILE AND DOMESTIC RELATIONS COURT

IN RE:
FILE NO.

The following parties were present:

( ) Juvenile ( ) G.A.L.

( ) Father ( ) Atty. For Father

( ) Mother ( ) Atty. For Mother

( ) DSS Representative ( ) Atty. For DSS

Type of Case: ( ) Felony ( ) Misdemeanor ( ) CHINS ( ) Custody ( ) Visitation ( ) Support Order ( ) Motion to Amend ( ) Other

Type of Hearing: ( ) Determination/appointment of counsel ( ) Detention Hearing ( ) Transfer Hearing ( ) Adjudicatory Hearing ( ) Disposition Hearing ( ) Continuance ( ) Review ( ) Show Cause ( ) Trial ( ) _____

Plea: ( ) guilty ( ) not Guilty

IT IS ORDERD THAT:

Christmas Holiday: child will go with Mom Christmas Day at 12:00 noon. Mom will keep child until 9am Sat. 12/28 wherein Child will stay with dad until Monday Dec 30 9 am. Child will go back to mom on 12/30 for her remaining weekly visitation. Regular visitation then begins with Dad on January 3, 2003 at 5:45pm New Years: Dad to get child at 12:00 noon New Years Day, 1/1/03 and return 1/2/03 at 9am.

If babysitter unavailable for exchange then exchange shall occur at the residence of Tyler Duffy

August 8, 2002
Date

Edward J. Berry
Edward Dej. Berry, Judge

VIRGINIA:

IN THE JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT FOR THE COUNTY OF GOOCHLAND

IN RE: STONE WYATT SMITH, minor
DOB; 9-15-00

Case Nos.: J J005582-S1 -00

PENDENTE LITE ORDER

[ENTERED MARCH 13, 2006]

THIS CAUSE came this 30th day of January, 2003 upon the custody petition filed on behalf of the Petitioner, Angela Dawn Smith; upon the appointment of Deborah S. Tinsley to serve as Guardian *ad litem* for the minor child of the parties; upon the temporary order entered by this Court on Augusts, 2002; upon the appearance of the Petitioner with her retained counsel, Deann D. Cook; upon the appearance of the Respondent, Dean E. Smith, with his retained counsel, James M. Nachman; and the minor child was represented by his Guardian ad /item, Deborah S. Tinsley; upon said exhibits filed herein; and was argued by the parties.

The Court after, hearing all evidence, reviewing the exhibits filed herein and the report of the Guardian *ad litem,* and in accordance with the standards and requirements set forth in Sections 20-124.1 through 20-124.6 of the Code of Virginia, and finding it to be in the best interests of the minor child of the parties herein, It is hereby **ORDERED, ADJUDGED, and DECREED** as follows:

1. Parents and the minor child shall enter counseling with Wendy Carroll at Orange Family Guidance to work on establishing a healthy family relationship between the minor child and each parent. The parties shall contact

Ms. Carroll to schedule appointments within two (2) weeks of January 30, 20031 A written report shall be filed by Ms. Carroll with the Court and the Guardian ad *item,* counsel for the parties.

2. The Guardian *ad litem* shall provide to Ms. Carroll copies of all relevant evaluations, including substance abuse evaluations and psychological evaluations, completed on the parties;

3. The minor child shall have visitation with the Respondent, Dean Smith, Wednesday through Monday every other week with drop-off being Monday at the babysitter. During the week that the minor child is not with the Respondent, the Respondent shall have an overnight visitation with the minor child Wednesday through Thursday at his parent's home in Goochland County.

4. Glenda Moseley shall continue to provide daycare for the minor child and all exchanges of the child for visitation shall occur at the home of Ms. Mosley;

5. The Guardian *ad litem* in conjunction with Ms. Carroll may adjust the visitation schedule if in the best Interest of the minor child pending court review.

6. The child shall not be alone with the paternal grandmother. Pursuant to Section 20-124.5 of the Code of Virginia, thirty days' advance written notice shall be given to the Court and the other parties by any party intending to relocate and of any intended change of address unless this Court, for good cause shown, orders otherwise. This notice shall include the child's name, the parents' names, and the names of any other individuals who have been involved with the child's custody or visitation.

This matter is set for June 5,2003 at 11:00 a.m. for a final order or to be set for trial.

The Clerk shall send a true copy of this Order to counsel and to the Guardian ad litem.

ENTERED: /s/
Judge

DATE: March 13, 2003

I Ask for This:

/s/
Deborah S.Tinsley
Guardian *-ad litem*
P.O. BOX 108
Goochland, VA 23063
(804) 556-5593

Seen:

/s/
Deanne D. Cook
Counsel for petitioner
P.O. Box 826
Richmond, VA 23218-0826
(804) 643-1400

/s/
James M. Nachman
Counsel for Respondent
808 N. Hamilton St., Suite A
Richmond, VA 23221
(804) 355-9955

APPENDIX C

SUBPOENA DUCES TECUM (CIVIL)
ATTORNEY ISSUED
VA. Code §§ 8.01-413, 16.1-89, 16.1-265

Commonwealth of Virginia Supreme Court Rules 1:4, 4-9

Case No.: JJ00055820100/JA004
January 30, 2003 at 9:30 Am
Hearing Date and Time

[ENTERED DECEMBER 6, 2002]

Goochland Juvenile and Domestic Relations Court
2938 Rover Road West. P.O. Box 47,
Goochland VA 23053
COURT ADDRESS

Angela D. Smith v. Dean E. Smith

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:

You are commanded to summon

Dr. Leslis Koyzanowskl. Tucker's Psychiatric
NAME

7605 Forest Avenue, Sts 405
STREET ADDRESS

Richmond	Virginia	23229
CITY	STATE	ZIP

To the person summoned: You are commanded to make available the documents and tangible things designated and described below:

SEE ATTACHED EXHIBIT "A"

At 701 E. Franklin St. Ste 1500, Richmond, VA, 22318-0826 at December 23, 2292 at 3:00 p.m.

To permit such party or someone acting on his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This Subpoena Duces Tecum is issued by the attorney for and on behalf of

Angelia D. Smith
PARTY NAME

Dennis D. Cook
NAME OF ATTORNEY

Bremmer, Janus, Cook & Marcus
OFFICE ADDRESS

P.O. Box 826 Richmond VA 23218-0826
OFFICE ADDRESS

December 6, 2002
DATE ISSUED

32771
VIRGINIA SATE BAR NUMBER

(804) 543-1400
TELEPHONE NUMBER OF ATTORNEY

(804) 543-1455
FACSIMILE NUMBER OF ATTORNEY

/s/
SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

RETURN OF SERVICE (see page two of this form)

TO the person summoned:

If you are served with this subpoena less than 14 days prior to the date that compliance with this subpoena is required, you may object by notifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

_x_ This SUBPOENA DUCES TECHUM is being served by a private process server who must provide proof of service in accordance with Va. Code § 8.01-325

To the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of the court.

Name: _____

Address: _____

_____

__ Personal Service / Tel. No. _____

Being unable to make personal service, a copy was delivered in the following manner:

__ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party above:

_____

_____

__ Posted on front door or such other door as appear to be the main entrance of usual place of abode, address listed above. (other authorized recipient not found.)

___ not found _____, Sheriff

_____ By, _____, Deputy Sheriff

Date

CERTIFICATE OF COUNSEL

I, Denna D. Cook, counsel for Angelia D. Smith, hereby certify that a copy of the forgoing subpoena duces tecum was _mailed_ to Jason M. Nachman, counsel of record for Dean E. Smith, on the 6th day of December, 2002.

/s/
SIGNATURE OF ATTORNEY

APPENDIX D

Subpoena for Witness (Civil)-
Attorney Issued VA Code §§ 8.01407; id. 1-265; Supreme Court Rules 1:4, 4:9
Commonwealth of Virginia

Case No JA4445-04-00JJ5582-01-00
January 30, 2003 at 9:30 am
Hearing Date and Time

[ENTERED JANUARY 13, 2003]

Goochland Juvenile and
Domestic Relations District Court
2938 River Road West, Goochland, VA 23063
ADDRESS OF COURT

Angela Smith v. Dean Smith

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:

You are commanded to summon

Dr. Leslie Koyzamowski, Tucker's Psychiatric
7605 Forest Avenue, Suite 406
Richmond, VA 23229

1807 Libbos Duly , Suite 206
Richmond VA 23226
New Address as of 1/27/03
2828377

To the person summoned: You are commanded to appear

___ in the _____Court

_x_ at Charlottesville Juvenile and Domestic Relations Court, 411 E. High Street, Charlottesville, VA 22901

On January 30, 2004 at 9:30 a.m. to testify in the above-named case.

This subpoena is issued by the attorney for and on behalf of Dean Smith

James. M. Nachman, Esquire
VSB # 39963
808 N. Hamilton Street
Richmond, VA 23221
(804) 355-9955 – telephone
(804) 355-9956 – telecopier

1/13/03	/s/
Date issued	Signature

Notice to Recipient: See page two for further information

RETURN OF SERVIECE
see page two of this form)

TO the person summoned:

If you are served with this subpoena less than 5 calendar days before your appearance is required, the court may, after considering all of the circumstances, refuse to enforce the subpoena for lack of adequate notice. If you are served with this subpoena less than 5 calendar days before your appearance is required, you may wish to contact the attorney who issued this subpoena and the clerk of the court.

To the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of the court.

Name: Dr. Leslie Koyzanowski, Tucker's Psychiatric

Address: 7605 Forest Ave, Suite 406
Richmond, VA 23229

Personal Service / Tel No. _____
Being unable to make personal service, a copy was delivered in the following manner:

__ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party above: Loanda Carpenter

_x_ Delivered To Representative

__ Posted on front door or such other door as appear to be the main entrance of usual place of abode, address listed above. (other authorized recipient not found.)
___ not found _____, Sheriff
1/14/03 By, /s/, Private Process Server
Date

CERTIFICATE OF COUNSEL

I, James M. Nachman, counsel for Dean Smith, hereby certify that a copy of the foregoing subpoena was mailed to Deama D. Cook, Esquire, P.O. Box 826, Richmond Va 23218, on the 13th day of January.

/s/
SIGNATURE OF ATTORNEY

APPENDIX E

July 8th 2002

Dear Jim,

I have been a patient of:

Leslie J. Kryzanowski, M.D.
Tucken Psychiatric Clinic
7605 Forest Avenue
Richmond, Virginia
Phone 282-8377

Since 1991.

If you need to talk to her, you have my permission

Thank you.

Beverly M. Smith
1284 Manlin Road
Goochland, Virginia 23063
457-4911

P.S. If there is a need, she will appear in court for her patients.

NACHMAN & KAUFMAN, L.L.P.
ATTORNEYS AT LAW

July 18, 2002

By Facsimile (643-1466) and Mail
Deanna D. Cook, Esquire
Bremer, Janus, Cook & Marcus
Post Office Box 826
Richmond Virginia 23218

Re: Angela Smith v. Dean Smith
Case No.: JA-1445-01

Dear Ms. Cook:

Your assumption that the parties cannot afford to litigate this matter is incorrect. My client is prepared to litigate because of the unreasonable position Ms Smith has taken to date. He is willing to litigate this matter in order to promote the best interests of Stone.

With regard to your proposal:

1. This is not acceptable. Instead, we propose joint physical and legal custody of their son, Stone. The visitation schedule that you propose is also unacceptable. It offers nothing more than what a party out of physical custody would normally receive, in fact, it offers even less. Even a party who does not have physical custody would probably get two weeks during the summer. Also, you insinuation that Stone would not be safe in the company of Dean's mother is ridiculous. I do not know what your client has shared with you regarding dean's mother, but we are prepared to have Mrs. Smith's psychologist to testify or produce an Affidavit stating that it is perfectly acceptable for Stone to be in the company of is paternal grandmother.

2. This is not acceptable. Mr. Smith was not fired from his job. He was laid off from his job. He was making approximately $22,000.00 per year, not $29,000.00. Now that he is not working full time, he will be making less than $22,000.00. I think if we use a shared custody guideline for child support purposes, we need to calculate it on a more equitable visitation schedule and a more realistic calculation of their earnings. We have no objection to the parties equally splitting all extraordinary medical and dental expenses as defined by code that are not covered by insurance.

3. This is not acceptable. Dean has paid the mortgage payments for June and July, just as he has always paid them. Your client has made no effort whatsoever to live up to her responsibilities as far as the mortgage payments are concerned. The civil war relics which you describe have a fair market value around $15,000.00, not in excess of $20,000.00. All of these civil war relics were acquired by Dean before the marriage and we consider these his own personal, separate property apart from any claim of marital property. Mr. Smith demands that his coin collection be returned to him. The entire coin collection was acquired before marriage and is his personal and separate property. It has an approximate value of $5,000.0 and should be returned immediately.

4. We have no objection to each party keeping his/her own vehicle, and refinancing their respective lien into their own name, if this is possible.

5. I understand that neither party has any retirement, IRA's or other investment accounts. Each party may have some term life insurance. Each party should keep their own life insurance policies.

6. We have no objection. There needs to be an accounting of the parties former joint checking account.

Evidently, some overdraft chargers were incurred by your client after she knew the joint account had been closed. She bounced several checks, causing several charges.

7. We respectfully decline your offer. We understand that the Commonwealth's Attorney intends to nolle posequi the assault and batter charge, so we have no need for an Accord and Satisfaction. We would have been prepared to go to trial regardless.

8. We have no objection to the parties waiving their respective rights or reservations to spousal support.

9. If we are to reach an agreement, we do not object to each party being responsible for their own attorney's fees and costs. Since your client brought this action, I am going to reserve our rights to ask for attorney's fees and costs. I don't think it is more practical for me to draft any potential agreement, because this is only going to cost my client money since I will have to bill him for my time to prepare the agreement.

Regarding your request for a continuance of the August 8, 2002 date is concerned, I cannot agree to a continuance at this time. We feel that as long as your client is withholding visitation from Mr. Smith we cannot agree to any continuance. Offering a visitation schedule of every other weekend and, more recently, one day a week is not acceptable to us. Mr. Smith has just as much right to custody and visitation at this time as does Mrs. Smith. We feel that the visitation being offered now is a withholding of visitation. Mr. Smith could take custody of Stone and offer Mrs. Smith the same sort of visitation. He has not done so because it would be patently unfair and not in the best interest of Stone. Also, we understand that the Guardian Ad Litem, Ms. Deborah Tinsley, may be asking that an order be entered for the parties to undergo psychological and drug testing. We

are in agreement with the Guardian that such orders should be entered on August 8th.

Please consider our proposal of joint physical and legal custody and I would appreciate a response upon your return from vacation on July 29, 2002, certainly no later than August 4, 2002.

Thank you and I look forward to hearing from you soon.

Sincerely,

/s/

James M. Nachman

JMN:jls

CC: Dean Smith

James M. Nachman/ Fredrick S. Kaufman
808 North Hamilton Street, Suite A/
Richmond Virginia 23211
Telephone 804/355-9255 Fax: 804/355-9258